

**CITY OF BUENAVENTURA**

**MBR/UV UPGRADE PROJECT**

**RFP VERSION – March 13, 2023**

**CONSTRUCTION-MANAGER-AT-RISK AGREEMENT**



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## CONSTRUCTION-MANAGER-AT-RISK AGREEMENT

This Construction-Manager-At-Risk Agreement (“**Agreement**”) is made and entered into [ ], 2023 (“**Effective Date**”), by and between the City of Buenaventura, a charter city and municipal corporation of the State of California (“**City**”), and [ ] (“**CMAR Firm**”).

### RECITALS

- A. City is a city in the State of California operating under a municipal charter under the Constitution of the State of California. This Agreement is authorized under said charter.
- B. Ventura Water, a division of City, operates the Ventura Water Reclamation Facility (“**VWRF**”) which provides wastewater services to approximately 109,000 residents and businesses within the City limits and water service to limited areas within unincorporated Ventura County and discharges tertiary treated effluent to the Santa Clara River Estuary (“**SCRE**”). The VWRF current average annual influent flow is approximately 7.5 MGD. City utilizes a small portion (annual average of 0.5 MGD) of recycled water from the VWRF to provide irrigation to adjacent parks, medians, and golf courses.
- C. City is interested in implementing membrane bioreactor (“**MBR**”) treatment as a part of the treatment scheme for the VWRF. MBR is a proven technology that provides: (a) robust biological treatment and nutrient removal, (b) robust pathogen removal, and (c) effective pretreatment ahead of reverse osmosis (“**RO**”) membranes. In conjunction, the City wishes to implement ultraviolet light disinfection (“**UV**”) as a replacement for chlorine disinfection. An anticipated downstream advanced water potable reuse facility (“**AWPF**”) would include RO and a UV advanced oxidation process (“**UV AOP**”) to meet requirements for groundwater injection of purified recycled water.
- D. Due to the need for the VWRF improvements and the ability to fit the processes into a potable reuse treatment train, City has decided to move forward with development of an MBR/UV system to replace the current secondary, tertiary and disinfection processes (the “**Project**”).
- E. On [ ], 2023, City approved and authorized the issuance of a Request for Proposals (as amended, “**RFP**”) for the Project consistent with City’s Procurement Policy (as defined in Section 1.1).
- F. In response to the RFP, City received [ ] proposals on or before [ ], 2023, evaluated the proposals and recommended award to CMAR Firm.
- G. On [ ], 2023, the City Council approved award of this Agreement to CMAR Firm.
- H. City desires to engage CMAR Firm to provide preconstruction and construction services for the Project, and CMAR Firm desires to be so engaged, on the terms and conditions specified in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the Parties agree as follows:

## AGREEMENT

### 1. DEFINITIONS, INTERPRETATION AND MISCELLANEOUS

#### 1.1 Definitions

Unless the context otherwise requires, definitions for certain capitalized acronyms, abbreviations and terms used in the Contract Documents have the meanings given in this Section 1.1.

AADWF	Average Annual Dry Weather Flows
API	American Petroleum Institute
ASCE	American Society of Civil Engineers
AWP	Advanced Water Purification
AWPF	Advanced Water Purification Facility
AWWA	American Water Works Association
BIM	Building Information Modeling
BODR	Basis of Design Report
BNR	Biological Nutrient Removal
CCR	California Code of Regulations
CEQA	California Environmental Quality Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
CMMS	Computerized Maintenance Management System
CPL	Contractor's Pollution Liability
DBE	Disadvantaged Business Enterprise
DDW	California State Water Resources Control Board Division of Drinking Water
DIR	California Department of Industrial Relations
DLSE	Division of Labor Standards Enforcement
EPA	United States Environmental Protection Agency
FEMA	Federal Emergency Management Administration
GBR	Geotechnical Baseline Report
GDIR	Geotechnical Data and Interpretive Report
GIS	Geographic Information System
GMP	Guaranteed Maximum Price
H <sub>2</sub> S	Hydrogen Sulfide
HDD	Horizontal Directional Drilling
HP	Horse Power
HVAC	Heating, Ventilation, and Air Conditioning
I&C	Instrumentation and Control
I/O	Input / Output
IPS	Influent Pump Station
IT	Information Technology
ISO	Insurance Services Office, Inc.
JAMS	Judicial Arbitration and Mediation Services, Inc.
LEG	London Engineering Group
MBE	Minority Business Enterprise
MBR	Membrane Bioreactor
MGD	Million Gallons per Day
MMRP	Mitigation, Monitoring and Reporting Program

MUTCD	Manual on Uniform Traffic Control Devices
NEPA	National Environmental Policy Act
NPDES	National Pollutant Discharge Elimination System
NTE	Not to Exceed
NTP	Notice to Proceed
OD	Outside Diameter
O&M	Operations and Maintenance
OSHA	Occupational Safety and Health Administration
P&ID	Piping and Instrumentation Diagrams
PDF	Portable Document Format
PS	Pump Station
PSR	Project Status Report
QA	Quality Assurance
QC	Quality Control
RBPS	Residuals Bypass Pump Station
RCRA	Resource Conservation and Recovery Act
RFI	Request for Information
RFP	Request for Proposal
RO	Reverse Osmosis
RPL	Railroad Protective Liability
SCADA	Supervisory Control and Data Acquisition
SRF	California Clean/Drinking Water State Revolving Fund
SCRE	Santa Clara River Estuary
SOQ	Statement of Qualifications
SPT	Standard Penetration Test
SWA	Surface Water Augmentation
SWRCB	California State Water Resources Control Board
TM	Technical Memorandum
UAV	Unmanned Aircraft Vehicles
UL	Underwriters Laboratories
UA AOP	UV Advanced Oxidation Process
UPS	Uninterrupted Power Supply
VECP	Value engineering change proposal
VWRF	Ventura Water Reclamation Facility
WATCH	Work Area Traffic Control Handbook
WBE	Women Business Enterprise
WBS	Work Breakdown Structure
WHD	Wage and Hour Division
WIFIA	Water Infrastructure and Innovation Act
WRF	Water Recycling Facility

**Acceptance** means the point in time when all of the conditions identified in the Scope of Work (Construction Phase) included in the Construction Phase Amendment have been met.

**Acceptance Date** means the date on which Acceptance occurs.

**Acceptance Deadline** means the date specified for Acceptance in the Project Specific Information (Construction Phase), included in the Construction Phase Amendment, as amendment in accordance with the Agreement.



**Acceptance Work** means all Work CMAR Firm is required to perform during the Post-Completion Period to achieve Acceptance, including in connection with the Test Plan.

**Actual Knowledge** means facts and information actually known to City, CMAR Firm, the City Representative or the CMAR Firm's Representative (in each case, as applicable), after due consultation with other personnel of such Person (or in the case of CMAR Firm, each CMAR-Related Entity), as applicable.

**Agreement** means the contractual relationship between the Parties:

- (a) for the Preconstruction Phase, constituted by:
  - (i) this Construction-Manager-at-Risk Agreement (including all Exhibits other than Exhibits 13 and 14; other than those provisions in the Div 01s which expressly apply to the Preconstruction Phase);
  - (ii) the Project Specific Information (Preconstruction Phase);
  - (iii) the Scope of Work (Preconstruction Phase); and
  - (iv) all other documents, if any, specified in the Project Specific Information (Preconstruction Phase);
- (b) for the Construction Phase (if Construction Phase Approval is obtained), constituted by:
  - (i) the documents referred to in subsection (a), except to the extent that the Project Specific Information (Preconstruction Phase) is superseded by the Project Specific Information (Construction Phase);
  - (ii) the Construction Phase Amendment; and
  - (iii) all other documents, if any, specified in the Project Specific Information (Construction Phase).

**all practicable steps** include attending such meetings, providing such drafts of documents and such other information, responding to such queries and proposals, obtaining such assistance from consultants and other third parties and doing all such things or tasks as may be reasonably required by City for the purpose of achieving the outcomes required under this Agreement.

**Allowance Item** means all work and/or goods described as allowance items in the Project Specific Information.

**Allowance Value** means the sum of money referred to in the Project Specific Information which is included in the Target Cost of the Work, including the direct cost of labor, materials, equipment, transportation, taxes and insurance directly associated with each applicable Allowance Item.

**American Iron and Steel Requirement** has the meaning given in Section 1.3 of Exhibit 10B (EPA Requirements).

**Applicable Law** means any statute, law, code, regulation, ordinance, rule, judgment, common law, writ, injunction, order, decree, permit, concession, grant, franchise, license, agreement,

directive, guideline, policy requirement or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity, which is applicable to the Project. The term “Applicable Law” excludes “Governmental Approvals.”

**Baseline Construction Phase Project Schedule** means the preliminary schedule for the Construction Phase Work which is prepared, updated and approved in accordance with the Contract Documents including the Scope of Work (Preconstruction Phase) and Div 01 32 21.

**Baseline Preconstruction Phase Project Schedule** means the preliminary schedule for the Preconstruction Phase Work which is prepared, updated and approved in accordance with the Contract Documents including the Scope of Work (Preconstruction Phase).

**Basis of Design Report** or **BODR** means the basis of design report prepared by the Design Engineer.

**Bond** means each of the Preconstruction Phase Bonds and the Construction Phase Bonds, or all of them, as applicable.

**Books and Records** means any and all documents, books, records, papers or other information of any CMAR-Related Entity relating to the Project Assets, including:

- (a) all drawings, specifications, Submittals, Subcontracts, invoices, schedules, cost models, meeting minutes, budgets, forecasts, Change Orders and Modifications;
- (b) all budgets, certificates, claims, correspondence, daily time sheet and supervisor's daily reports, data (including test data), cost accounting data, documents, expert analyses, facts, files, information, investigations, materials, notices, payroll documents, plans, projections, proposals, records, reports, requests, samples, schedules, settlements, statements, studies, surveys, tax returns and information, tests, test results, vehicular traffic information, operational information analyzed, categorized, characterized, created, collected, generated, maintained, processed, produced, prepared, provided, recorded, stored or used by any CMAR-Related Entity in connection with the Project Assets;
- (c) union agreements;
- (d) insurance, welfare and benefits records;
- (e) payroll registers;
- (f) earnings records;
- (g) payroll tax forms;
- (h) material invoices and requisitions;
- (i) material cost distribution work sheet;
- (j) equipment records (list of company equipment, rates, etc.);
- (k) Subcontractor (including supplier) invoices;

- (l) Subcontractors' and agents' payment certificates;
- (m) canceled checks;
- (n) job cost report;
- (o) job payroll ledger;
- (p) general ledger;
- (q) cash disbursements journal;
- (r) project schedules, including the Construction Phase Project Schedule;
- (s) all documents that relate to each and every Claim and Dispute, together with all documents that support the amount of damages as to each Claim or Dispute;
- (t) work sheets used to prepare the Claim or Dispute establishing the cost components for items of the Claim or Dispute, including labor, benefits and insurance, materials, equipment, Subcontractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals;
- (u) emails;
- (v) network servers, data storage devices, backup tapes/media;
- (w) letters and correspondence; and
- (x) with respect to all of the above, any information that is stored electronically or on computer-related media.

For purposes of the requirements of this Agreement to maintain Books and Records, the term "Books and Records" includes documents or information that are subject to the attorney-client privilege, but for purposes of requirements of this Agreement to provide access to Books and Records, the term specifically excludes documents or information that are subject to the attorney-client privilege and are identified in a privilege log as attorney-client privileged information.

**CEQA Approval** means collectively, (a) the Ventura Water Supply Projects Final Environmental Impact Report adopted by the City in September 2019 (SCH#2017111004); and (b) the Ventura Water Supply Projects Environmental Impact Report Addendum as approved and adopted by the City in September 2022.

**Change** has the meaning given in Section 21.1.1.

**Change in Law** means the enactment, adoption, modification, repeal or other change in any Applicable Law that occurs after the applicable Setting Date, including:

- (a) any change in the judicial or administrative interpretation of any Applicable Law,
- (b) adoption of any new Applicable Law; or

- (c) any change in Applicable Law related to sales tax on materials that are permanently incorporated in the Work;

provided such enactment, adoption, modification, repeal or other change is materially inconsistent with Applicable Laws in effect on the applicable Setting Date and materially, adversely and directly impacts CMAR Firm's obligations under the Contract Documents or materially increases CMAR Firm's cost of performing its obligations under the Contract Documents, but excluding:

- (v) any change in or new Applicable Law which was passed or adopted but not yet effective as of the applicable Setting Date;
- (w) a change in the way an Applicable Law is applied or interpreted as a result of:
  - (i) the failure of any CMAR-Related Entity to comply with any Applicable Law or any Governmental Approval; or
  - (ii) any act or omission of any CMAR-Related Entity or any CMAR Firm Default;
- (x) a change in any Applicable Law relating to taxes, except as provided in subsection (z) of this definition;
- (y) a change in Applicable Law which was not in force at the applicable Setting Date but which is substantially the same as a Applicable Law in force prior to applicable Setting Date; or
- (z) any change in or new social distancing requirements, stay-at-home or other Applicable Law associated with COVID-19, which shall be treated as described in the definition of Force Majeure Event.

**Change of Control** means any assignment, sale, financing, grant of security interest, transfer of interest or other transaction of any type or description, including by or through voting securities, asset transfer, contract, merger, acquisition, succession, dissolution, liquidation or otherwise, that results, directly or indirectly, in a change in possession of the power to direct or control or cause the direction or control of the management of CMAR Firm or a material aspect of its business. A Change of Control of a shareholder, member, partner or joint venture member of CMAR Firm may constitute a Change of Control of CMAR Firm if such shareholder, member, partner or joint venture member possesses the power to direct or control or cause the direction or control of the management of CMAR Firm. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

- (a) a change in possession of the power to direct or control the management of CMAR Firm or a material aspect of its business due solely to a bona fide transaction involving beneficial interests in the ultimate parent organization of a shareholder, member, partner or joint venture member of CMAR Firm, (but not if the shareholder, member, partner or joint venture member is the ultimate parent organization), unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal or State department or agency;

- (b) an upstream reorganization or transfer of direct or indirect interests in CMAR Firm so long as no change occurs in the entity with ultimate power to direct or control or cause the direction or control of the management of CMAR Firm;
- (c) a transfer of interests between managed funds that are under common ownership or control other than a change in the management or control of a fund that manages or controls CMAR Firm; or
- (d) the exercise of minority veto or voting rights (whether provided by Applicable Laws, by CMAR Firm's organizational documents or by related member or shareholder agreements or similar agreements) over major business decisions of CMAR Firm, provided that if such minority veto or voting rights are provided by shareholder or similar agreements, City has previously received copies of such agreements.

**Change Order** means a written order issued by the City Representative under Section 21.2 which directs CMAR Firm to make Changes to the Work.

**Change Order Price Request** has the meaning given in Section 21.1.1.

**City** has the meaning given in the introductory paragraph of this Agreement.

**City-Caused Delay** means any of the following events that have a material and direct impact on the performance of the Work:

- (a) any Change Order issued by City to CMAR Firm as described in Section 21.2.1;
- (b) City's failure to provide timely access to the Site in accordance with Section 11.1;
- (c) City's failure to fulfill any express obligation under the Contract Documents;
- (d) City's failure or inability to provide responses to Submittals and matters for which an affirmative response by City is required, within the time periods indicated in the Contract Documents; provided, however, that the foregoing shall not apply where any City failure to act is deemed disapproval under the Submittal Requirements;
- (e) any order of City to suspend for convenience exceeding 24 hours in total for a single suspension or 96 cumulative hours in total across multiple suspensions under (or deemed under) Section 12.2 which limits shall apply separately to Construction Phase;
- (f) any fraud, criminal conduct, willful misconduct or grossly negligent act or omission of City or breach of Applicable Laws by City;
- (g) in the case of Preconstruction Phase only, failure of City to issue NTP 1 within 30 days after the Effective Date;
- (h) in the case of Construction Phase only and provided Construction Phase Approval has been obtained, failure of City to issue NTP 2 within 30 days after the Date of Construction Phase Approval; and

- (i) except as set out in Section 8.5, uncovering, removing and restoring Work under Section 8.6.2 where the Work uncovered, removed, or restored is in accordance with the Contract Documents.

**City Procurement Policy** means the Administrative Policy and Procedure: Design-Build and Construction Manager at Risk Project Delivery adopted by City.

**City-Provided Approvals** means:

- (a) CEQA Approval;
- (b) NEPA Approval;
- (c) Coastal Development Permit (Construct);
- (d) NPDES Permit; and
- (e) any additional City-Provided Approvals specified in the Project Specific Information (Construction Phase) as determined by the City as part of the Construction Phase Amendment.

**City Representative** means the person specified in the Project Specific Information (Preconstruction Phase) or any other person nominated by City from time to time under Section 7.2.4 to replace that person.

**City's Conflict of Interest Policy** means the Conflict-of-Interest Policy Covering Design-Build and Construction Manager at Risk Projects adopted by City.

**Claim** means any claim, proceeding, action, cause of action, demand (including any demand under Section 28), judgment, investigation or suit (including by way of contribution or indemnity) made:

- (a) in connection with this Agreement or the Project Assets; or
- (b) under Applicable Laws or in equity,

whether for specific performance, restitution, payment of money (including damages), an extension of time, or any other form of relief. Submission by CMAR Firm of a request for Change Order is not a Claim.

**CMAR Firm** has the meaning given in the introductory paragraph of this Agreement.

**CMAR Firm Default** has the meaning given in Section 25.2.

**CMAR Firm Fault** means any breach of the Contract Documents, negligence, gross negligence, fraud, bad faith, recklessness, criminal conduct, intentional misconduct, breach of Applicable Law or any other negligent or culpable act or omission by any CMAR-Related Entity.

**CMAR Firm Hazardous Materials Release** means:

- (a) any spill or release, threatened spill or release, or exacerbation of any existing release or condition of Hazardous Materials attributable to any CMAR Firm Fault; or
- (b) any Known or Suspected Hazardous Materials that CMAR Firm could have avoided by commercially reasonable construction techniques.

**CMAR Firm's Contingency** means those contingency items designated for reimbursement under Section 18.8.1(b).

**CMAR Firm's Delay Rate** means the daily amount payable in accordance with Section 18.6.3(a), as specified in the Project Specific Information (Construction Phase).

**CMAR Firm's Fee** means the fixed fee included in the GMP covering the CMAR Firm's overhead and profit for the Construction Phase, respectively.

**CMAR Firm's Representative** means the person specified in the Project Specific Information or any other person from time to time appointed as CMAR Firm's Representative in accordance with Section 7.3.

**CMAR-Related Entity(ies)** means CMAR Firm, Subcontractors or any other Persons performing any of the Work, any other Persons for whom CMAR Firm may be legally or contractually responsible and the employees, agents, representatives, shareholders, directors, members, managers, partners and officers of any of the foregoing.

**Compensable Event** means any Relief Event other than a Force Majeure Event.

**Completion** means the point in time when all of the conditions provided in Exhibit 8 (Completion Requirements) have been achieved with respect to any Early Work or the Project.

**Completion Deadline** means the date specified for Completion of any Early Work in the Change Order for such Work or the date specified for Completion of the Work in the Project Specific Information (Construction Phase), as such dates may be adjusted in accordance with this Agreement.

**Consequential Damages** mean special, indirect, or incidental damages that do not flow directly and immediately from an injurious act but that result indirectly from an action or failure to act, such as revenue losses, loss of use, cost of capital, debt service, loss of profit on related contracts, administrative costs, loss of bonding capacity, lost opportunity, claims of taxpayers and other indirect damage.

**Construction Cost Index (CCI)** means the Construction Cost Index contained in the "ENR City Cost Index" for Los Angeles, as published by Engineering News-Record. If the CCI is discontinued or substantially altered, a suitable replacement will be determined by the Parties in accordance with general market practice at the time.

**Construction Management Plan** means the plan prepared, updated and approved in accordance with the Contract Documents including Section I.F.1 of the Scope of Work (Preconstruction Phase).

**Construction Manager** means the Key Person identified in the Project Specific Information (Preconstruction Phase) as responsible for the overall Construction Work incorporated into the Project, or approved replacement.

**Construction Phase** means the period during which the Construction Phase Work is performed, commencing on the issuance of NTP 2 and ending upon Acceptance or earlier termination of this Agreement.

**Construction Phase Amendment** means the Modification entered into by the Parties amending this Agreement to include the Project Specific Information (Construction Phase), Special Provisions, Project Plans, Specifications, Exhibit 9B (Insurance Requirements – Construction Phase), City-approved GMP Proposal, Baseline Construction Phase Project Schedule and all other necessary amendments to this Agreement required for the Construction Phase.

**Construction Phase Approval** means all of the following conditions have been satisfied or waived in writing by City:

- (a) City has provided the Special Provisions, Project Plans and Specifications as required by Section 9.3;
- (b) City has approved the GMP Proposal as required by Section 9.8.2;
- (c) City has approved the Construction Phase Project Schedule;
- (d) City has approved all Management Plans required to be completed by CMAR Firm as a condition of Construction Phase Approval;
- (e) the Preconstruction Phase Milestones have been achieved;
- (f) the proposed Construction Phase Amendment has been prepared and agreed in accordance with Section 9.7 and executed by both Parties;
- (g) City has closed all financing or obtained all funding for the Construction Phase Work;
- (h) all Governmental Approvals required for start of the Construction Phase Work have been obtained;
- (i) CMAR Firm has otherwise complied with all of its obligations under the Contract Documents required to be performed prior to start of the Construction Phase; and
- (j) the City Council has approved the Construction Phase Amendment.

**Construction Phase Approval Deadline** means the date specified for Construction Phase Approval in the Project Specific Information (Preconstruction Phase), as amended in accordance with this Agreement.

**Construction Phase Bonds** has the meaning given in Section 6.2.

**Construction Phase Fixed General Conditions Costs** means those portions of the Cost of the Work described in Section 1.1.4 of Exhibit 7 (Cost of the Work) to be included as Fixed General



Conditions Costs for the Construction Phase Work (including any Early Work), as provided in the Construction Phase Amendment.

**Construction Phase Milestone Deadlines** means:

- (a) the dates specified in the Project Specific Information (Construction Phase) for each Construction Phase Milestone; and
- (b) the date or period of time agreed between CMAR Firm and City and specified in the Project Specific Information (Construction Phase) for any Early Work,

as adjusted (if at all) under this Agreement.

**Construction Phase Milestones** means the milestones specified in the Project Specific Information (Construction Phase) or any additional Early Work or milestones agreed or determined by City and specified in the Project Specific Information.

**Construction Phase Payment Bond** has the meaning given in Section 6.2.1(b).

**Construction Phase Performance Bond** has the meaning given in Section 6.2.1(a).

**Construction Phase Project Schedule** means the schedule for the Construction Phase Work which is prepared, updated and approved in accordance with the Contract Documents including the Scope of Work (Preconstruction Phase) and Div 01 32 21, based upon the Baseline Construction Phase Schedule.

**Construction Phase Work** means that part of the Work to be performed during Construction Phase more particularly described in the Special Provisions, Project Plans and Specifications, including those things or tasks required by any direction of the City Representative given or purported to be given under a provision of this Agreement, including any Change Order.

**Construction Superintendent** means the Key Person identified in the Project Specific Information (Preconstruction Phase) as responsible for on-site field supervision and direction of the Construction Work, or approved replacement.

**Construction Work** means all Work to build or construct, rehabilitate, upgrade, make, form, manufacture, furnish, install, supply, deliver, landscape, equip, test and commission any structure, building, or other improvement to real property included in the Project, but excluding the Preconstruction Work.

**Contingency(ies)** means, during the Construction Phase, each of the CMAR Firm's Contingency and the Cost of the Work Contingency, or both of them, as applicable.

**Contract Documents** means this Agreement (including Exhibits), the Standard Plans, the Specifications, Change Orders and Modifications.

**Cost of the Work** has the meaning given in Exhibit 7 (Cost of the Work).

**Cost of the Work Contingency** means those contingency items designated for reimbursement under Section 18.8.1(a).

**Cost Submission** has the meaning given in Section 9.13(b).

**Date of Completion** means the date of Completion of the Work or a portion thereof as set out in the Notice of Completion for such Work.

**Date of Construction Phase Approval** means the date on which the City Council stated in a notice under Section 9.8.2.

**DBE Participation Plan** means the plan prepared by CMAR Firm in accordance with Section I.E of the Scope of Work (Preconstruction Phase), as such plan may be updated from time to time.

**Default Notice** has the meaning given in Section 25.3.2.

**Default Termination Event** has the meaning given in Section 25.4.1.

**Defect** means:

- (a) any error, omission, inconsistency, inaccuracy, deficiency or other defect; and
- (b) any aspect of the Work that (i) does not comply with the requirements of the Contract Documents or (ii) is not consistent, or is incompatible, with its age, function, performance and use (in each case, as contemplated by the Contract Documents) when properly maintained in accordance with Good Industry Practice, any manufacturer's requirements and the requirements described in the Contract Documents.

**Design Engineer** means the Person selected by City to design the Project as identified in the Project Specific Information (Preconstruction Phase), or any replacement Person designated by City in writing as the Design Engineer.

**Design Work** means all work of design, engineering, architecture and other professional services for the Project, performed by the Design Engineer.

**Differing Site Condition** means:

- (a) subsurface or latent physical conditions (including Utility Facilities and City facilities) encountered at or near the Site that differ materially from those indicated in the Project Plans, Specifications, GBR, GDIR, and other information disclosed in the Request for GMP Proposal provided by City;
- (b) physical conditions of an unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in the type of work provided for in the Contract Documents, including:
  - (i) the discovery at, near or on the Site of any archaeological, paleontological, biological or cultural resource; and
  - (ii) the discovery at, near or on the Site of any species listed as threatened or endangered under the federal or State Endangered Species Act, except to the extent that any City-Provided Approval provides for mitigation measures to be undertaken with respect thereto (regardless of whether the species is listed as threatened or endangered as of the Effective Date),

unless the CMAR Firm knew of the existence of such condition prior to the relevant Setting Date or would have become aware of such condition by undertaking a Reasonable Investigation prior to the Setting Date, including any information regarding utilities available from USA Dig Alert of Southern California.

The definition of “Differing Site Condition” excludes Hazardous Materials.

**Directive Letter** means a letter issued by City under Section 21.2.

**Dispute** means a disagreement between the Parties as to the merits, amounts, or remedy arising out of an issue in controversy, including a disagreement regarding a Claim.

**Div 01s** generally means the Division 01 Specifications (Exhibit 14E), as such specifications may be revised by the Construction Phase Amendment. The only Div01 that applies to the Preconstruction Phase is Div 01 32 21.

**Early Work** means Construction Phase Work performed prior to the Construction Phase Approval performed in accordance with Section 9.7.

**Effective Date** means the date on which this Agreement has been fully executed and delivered by City and CMAR Firm.

**Eligible Surety** means a Surety licensed in the State, listed on the U.S. Department of the Treasury’s “List of Certified Companies” (found at <https://fiscal.treasury.gov/surety-bonds/list-certified-companies.html>), rated “A” or higher by at least two nationally-recognized rating agencies (Fitch Ratings, Moody’s Investor Service and Standard & Poor’s) or rated at least A-, X or higher according to A.M. Best’s Financial Strength Rating and Financial Size.

**Engineer** means the City’s VenturaWaterPure Program Director.

**Environmental Law(s)** means (1) all Applicable Laws applicable to the Project Assets now or hereafter in effect regulating, relating to, or imposing liability or standards of conduct concerning the environment or to generation, production, emissions, discharges, storage, use, handling, transportation, treatment, disposal, remediation, releases or threatened releases of Hazardous Materials or other hazardous, toxic or dangerous waste, pollutants, contaminants, substances, or materials into the environment including into the air, surface water or ground water or onto land, and (2) any requirements and standards that pertain to the protection of the environment, or to the management of Hazardous Materials or generation, production, emissions, storage, use, handling, transportation, treatment, disposal, remediation, discharges, releases or threatened releases of Hazardous Materials or other hazardous, toxic or dangerous waste, pollutants, contaminants, substances or materials into the environment, contamination of any type whatsoever, or health and safety matters with respect to Hazardous Materials, set forth in any Governmental Approval, or other criteria and guidelines promulgated, pursuant to Applicable Laws applicable to the Project Assets, as each of the foregoing have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof), including those relating to:

- (a) the manufacture, processing, distribution, use, re-use, treatment, storage, disposal, transport or handling of Hazardous Materials or other hazardous, toxic or dangerous waste, pollutants, contaminants, substances or materials;

- (b) the protection of public health, public welfare, public safety or the environment (including protection of nonhuman forms of life, land, surface water, groundwater and air);
- (c) air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;
- (d) releases of Hazardous Materials;
- (e) protection of wildlife, endangered, threatened, and sensitive species, wetlands, water courses and water bodies, parks and recreation lands, cultural, historical, archeological, and paleontological resources and natural resources;
- (f) the operation and closure of underground or aboveground storage tanks;
- (g) health and safety of employees and other persons with respect to Hazardous Materials; or other hazardous, toxic or dangerous waste, pollutants, contaminants, substances or materials; and
- (h) notification, documentation and record keeping requirements relating to the foregoing.

**Existing City Facilities** means those existing facilities, structures and improvements identified in Exhibit 12 (Existing City Facilities), as such exhibit may be modified by the Construction Phase Amendment.

**Extended General Conditions Costs** has the meaning given in Section 18.6.3(c).

**Facilities** means the entire physical infrastructure and capital improvements to the Project to be designed, constructed, commissioned and completed by CMAR Firm on the Site in accordance with the Contract Documents including the MBR/UV.

**Force Majeure Event** means any of the events listed in subsections (a) through (g) below, subject to the exclusions listed in subsections (i) through (vi) below, which has a material, adverse and direct impact on CMAR Firm's obligations under this Agreement:

- (a) any earthquake, tsunami, tornado, hurricane, uncontrolled fire in an area of combustible vegetation, lightning, one in a 100-year flood or other natural disaster occurring in the vicinity of the Project;
- (b) subject to subsection (vi), any epidemic or pandemic, or stay at home or shelter in place order as declared by a local, state or federal authority authorized to make emergency declaration, in the Ventura County, California area or outside of that area if it impacts the supply chain for the necessary materials or equipment or labor obligations;
- (c) any war, civil war, invasion, blockade, embargo, violent act of foreign enemy armed conflict, or act of terrorism;
- (d) any act of riot, insurrection, sabotage or civil commotion;

- (e) issuance of a temporary restraining order or other form of injunction by a court that prohibits the performance of a material portion of the Work;
- (f) the suspension, termination, interruption, denial or failure to obtain, failure to maintain, or non-renewal of the City-Provided Approvals, except if such suspension, termination, interruption, denial or failure to obtain, failure to maintain or non-renewal arises from failure by any CMAR-Related Entity perform the Work in accordance with any Governmental Approval; and
- (g) any strike, lockout or other dispute not caused by CMAR Firm generally affecting the construction industry in the State, but excluding any strike, lockout or similar dispute specific to the Project or any CMAR-Related Entity.

excluding:

- (i) any physical destruction or damage, or delays to the Work which occur by action of the elements or weather events, except as specified in subsection (a);
- (ii) except as provided in subsections (c) and (d), malicious or other acts intended to cause loss or damage or other similar occurrence, including vandalism or theft;
- (iii) the suspension, termination, interruption, denial, failure to obtain, non-renewal or change in any requirements of any Governmental Approval, except for any such matter falling within the scope of subsections (a) through (g);
- (iv) the presence at, near or on the Site, of any Hazardous Material, including any substance disclosed to CMAR Firm as well as any substance contained in any structure required to be demolished in whole or in part or relocated as part of the Work;
- (v) any matters not caused by City or beyond the control of City or any other matter not listed in subsections (a) through (g); and
- (vi) social distancing requirements and stay-at-home orders associated with COVID-19 or other comparable impacts on the Work related to the COVID-19 or other pandemic shall not be considered a Force Majeure Event except to the extent of requirements imposed by Applicable Law that are materially different from those in effect on the applicable Setting Date. As an example, issuance by the California Governor of a new or modified executive order that precludes performance of site investigations for the Project would be considered a Force Majeure Event with respect to performance of such site investigations.

**Funding Programs** has the meaning given in Section 5.1.

**Geotechnical Baseline Report (GBR)** means the geotechnical baseline report prepared by the Design Engineer and provided to CMAR Firm prior to commencement of the Construction Work.

**Geotechnical Data and Interpretive Report (GDIR)** means the report prepared by the Design Engineer providing findings, data, analysis and recommendations from Design Engineer's geotechnical field investigations.

**GMP** means the guaranteed maximum price approved, agreed or determined, as applicable, as part of the Construction Phase Amendment and specified in the Project Specific Information (Construction Phase), comprising:

- (a) the Target Cost of the Work, including the Cost of the Work Contingency and Allowance Values; plus
- (b) the Fixed General Conditions Cost; plus
- (c) the CMAR Firm's Fee; plus
- (d) the CMAR Firm's Contingency; plus
- (e) premiums for bonds and insurance for Construction Phase,

as adjusted in accordance with this Agreement.

**GMP Cost Model** means the open and transparent model that CMAR Firm develops and uses through the Preconstruction Phase so that estimates and assumptions are prepared in accordance with the requirements of this Agreement and communicated to the City.

**GMP Proposal** means CMAR Firm's proposal to perform the Construction Phase Work, which is prepared and submitted to City for approval in accordance with Section I.E.16 of the Scope of Work (Preconstruction Phase) and the considerations in Section 9.4, as such proposal may be amended in accordance with this Agreement.

**Good Industry Practice** means the exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from a skilled and experienced constructor, supplier or other contractor seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals and engaged in the same type of undertaking under circumstances similar to the Project and conditions similar to those within the same geographic area as the Site.

**Governmental Approval** means any permit, license, consent, concession, grant, franchise, authorization, waiver, certification, exemption, filing, lease, registration or ruling, variance or other approval, guidance, protocol, mitigation agreement, agreement or memoranda of agreement/understanding, and any revision, modification, amendment, supplement, renewal or extension of any of the foregoing, required by or with any Governmental Entity in order to perform the Work, but excluding (a) any such approvals relating to the work to be performed by Other Contractors as specifically described in this Agreement, and (b) any such approvals required by or with a Governmental Entity in its capacity as a Utility Owner. The term "Governmental Approvals" includes City-Provided Approvals and permits to be obtained by CMAR Firm.

**Governmental Entity(ies)** means any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity other than City.

**Guarantor** means each Person (if any) providing a guaranty as described in Section 6.6 and specified in the Project Specific Information (Preconstruction Phase).

**Hazardous Material(s)** includes hazardous substances and hazardous waste and means any:

- (a) substance, product, waste or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the California Hazardous Waste Control Act, Health and Safety Code § 25100 *et seq.*; the California Hazardous Substance Account Act, Health and Safety Code § 25330 *et seq.*; the California Safe Drinking Water and Toxic Enforcement Act, Health and Safety Code § 25249.5 *et seq.*; Health and Safety Code § 25280 *et seq.*; the California Hazardous Waste Management Act, Health and Safety Code § 25170.1 *et seq.*; Health and Safety Code § 25501 *et seq.*; or the California Porter-Cologne Water Quality Control Act, Water Code § 13000 *et seq.*, all as amended, or any other federal, state or local statute, law, ordinance, resolution, code, rule, regulation, order or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect;
- (b) any substance, product, waste or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance or strict liability or under any reported decisions of a state or federal court;
- (c) notwithstanding Health and Safety Code § 25317, petroleum or crude oil excluding de minimus amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles;
- (d) any asbestos or asbestos-containing materials in structures and or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground); and
- (e) other substances, product, waste or material defined, or to be treated or handled, as a Hazardous Materials pursuant to provisions of this Agreement.

**Hazardous Materials Management** means procedures, practices and activities to address and comply with Environmental Laws and Governmental Approvals with respect to Hazardous Materials encountered, impacted, caused by or occurring in connection with the Project, including investigation, timely notice to City, removal and remediation of such Hazardous Materials. Hazardous Materials Management may include sampling, stock-piling, storage, backfilling in place, asphalt batching, recycling, treatment, clean-up, remediation, transportation and/or off-site disposal of Hazardous Materials, whichever approach is effective, most cost-efficient and permitted under Applicable Laws.

**Incentive** means the incentive (if any) to which CMAR Firm may become entitled and which is to be calculated in accordance with Section 18.10, as amended in accordance with this Agreement.

**Indemnified Parties** means (b) City, California State Water Resources Control Board, California Infrastructure and Economic Development Bank, United States Bureau of Reclamation and any other Governmental Entities identified by City as Indemnified Parties, or all of them as applicable; and (b) each of their respective officers, trustees, directors, board members, employees, representatives, authorized volunteers, representatives, agents, consultants performing services in connection with the Project or all of them, as applicable.

**Insurance Requirements** has the meaning given in Section 23.1.1.

**Intellectual Property** means all current and future legal and/or equitable rights and interests in know-how, patents (including applications), copyrights (including moral rights), trade marks (registered and unregistered), service marks, trade names, trade dress, trade secrets and trade secret rights, designs (registered and unregistered) and design rights, utility models, circuit layouts, plant varieties, business and domain names, inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Project or its design data. Intellectual Property is distinguished from physical, digital or mechanical embodiments of such Intellectual Property, including physical construction and equipment itself and from data, sketches, charts, calculations, drawings, plans, depictions, specifications, layouts, depictions, manuals, electronic files, artwork, correspondence, other documentation that disclose Intellectual Property.

**Key Personnel** means, together, (a) the individuals listed in the Project Specific Information (Preconstruction Phase) and (b) any other individuals appointed by CMAR Firm and approved by City from time to time to fill such “Key Personnel” position (each is a “**Key Person**”).

**Known or Suspected Hazardous Materials** means Hazardous Materials that are known or reasonably suspected to exist as of the applicable Setting Date from information or analysis contained in or referenced in the Reference Documents (including from any of the sites identified in the CEQA Approval as having or potentially having Hazardous Materials), or Hazardous Materials that would have become known to CMAR Firm by:

- (a) in the case of Work performed prior to the Construction Phase Approval Deadline (excluding Early Work performed in accordance with Section 9.7), by undertaking Reasonable Investigation prior to the Proposal due date;
- (b) in the case of any Early Work, known to CMAR Firm prior to City’s issuance of NTP for the Early Work or that CMAR Firm could have discovered by undertaking Reasonable Investigation prior to that NTP; and
- (c) in the case of Work performed after the Construction Phase Approval Deadline, by performing a Preconstruction Phase Site Investigation as required under the Scope of Work (Preconstruction Phase) or such other investigations required in accordance with Good Industry Practice prior to the Date of Construction Phase Approval.

**Lead Estimator** means the Key Person identified in the Project Specific Information (Preconstruction Phase) as responsible for cost controls, estimating, and budgeting for the Work, or approved replacement.

**Lien** means any pledge, lien, hypothecation, security interest, mortgage, deed of trust or other charge, encumbrance or restriction on title or property interest of any kind, or any other type of



preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument and the filing of or agreement to file any financing statement under the Uniform Commercial Code of any jurisdiction).

**Lifecycle Cost** means the total of the direct/indirect, recurring/non-recurring, fixed/variable financial costs to City arising in connection with the Work over the whole life of the Work, including the costs of designing and constructing the Work prior to Completion and occupying, using, operating and maintaining the Work after Completion.

**Lifecycle Objectives** means balancing:

- (a) Lifecycle Cost;
- (b) Asset Management Support;
- (c) the useful life of the Facilities;
- (d) the reliability and availability of the Facilities throughout their useful life; and
- (e) the value for money achieved by City from the design and construction of the Project, taking into account the information provided by City regarding the use, occupation, operation and maintenance of the Facilities.

**Listed Subcontractor** means each of the Subcontractors listed in the Proposal or the Construction Phase Proposal, as identified in Appendix 3 to Exhibit 1 (for the Preconstruction Phase) and in Appendix 1 to Exhibit 13 (for the Construction Phase).

**Losses** includes any loss, damage, injury, compensation, debt, obligation, charge, liability, cost, expense (including attorneys' fees, accountants' fees, expert witness fees and expenses, including those incurred in connection with the enforcement of any provision of this Agreement), deductibles or increased premiums, fee, charge, demand, investigation, proceeding, action, suit, judgment, penalty, fine or third party Claims, whether actual, prospective or contingent and whether or not currently ascertainable. Losses include injury to or death of persons, damage or loss of property, harm or damage to natural resources, and loss of or damage to valuable papers and records.

**Lump Sum SOW** has the meaning given in Section 18.7.1.

**Major Equipment** means any equipment purchase for Construction Work valued in excess of \$2 million.

**Major Subcontract** means a Subcontract with a Major Subcontractor.

**Major Subcontractor** means any Subcontractor with a Subcontract or Subcontracts in excess of \$2 million.

**Management Plans** means the management plans specified in the Project Specific Information.

**Maximum Fee Percentage** means the maximum percentage of the estimated Cost of the Work, as set forth in the Project Specific Information (Preconstruction Phase), that will be used to

negotiate the CMAR Firm's Fee included in any the GMP, any Change Orders for Early Work, and any Change Orders adjusting the GMP, representing total compensation for the CMAR Firm's profit and overhead for the Construction Phase Work.

**Milestone Deadlines** means each of the Preconstruction Phase Milestone Deadlines, Construction Phase Milestone Deadlines, Completion Deadline for the Work or any Early Work, or all of them, as applicable.

**Milestones** means each of the Preconstruction Phase Milestones and Construction Phase Milestones, or all of them as applicable. If any Early Work is to be performed under Section 9.7, Completion of the Early Work or Milestones agreed shall be deemed a Milestone.

**MBR/UV** means the membrane bioreactor (MBR) and ultraviolet (UV) disinfection system to be designed by the Design Engineer and constructed by CMAR Firm in accordance with the Contract Documents.

**Modification** means a written amendment to the Contract Documents signed by the Parties.

**Notice of Completion** means a notice under Section 17.3.1(a) issued by the City Representative stating that Completion of the Work or any Early Work has been achieved.

**Notice of Acceptance** means a notice under Section 17.6.1(a) issued by the City Representative stating that Acceptance of the Work or any Early Work has been achieved.

**NPDES Permit** means permit CA0053651 issued by the California Regional Water Quality Control Board Los Angeles Region, a copy of which is available for review at <https://www.cityofventura.ca.gov/DocumentCenter/View/20828/2020-Ventura-Water-Reclamation-Facility-NPDES>, as such permit may be modified from time to time.

**NTP 1** means City's issuance to CMAR Firm of a written notice to proceed with the Preconstruction Phase Services.

**NTP 2** means City's issuance to CMAR Firm of a written notice to proceed with the Construction Phase Work.

**O&M Manual** means the manual providing operating and maintenance protocols for the Facilities developed by CMAR Firm and approved by City in accordance with the Special Provisions, Project Plans and Specifications.

**Open Book Basis** means providing City all underlying assumptions, price quotes and data associated with pricing or compensation (whether of CMAR Firm or City) or adjustments thereto, including assumptions as to costs of the Work, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, and other items reasonably required by City to satisfy itself as to the reasonableness of the amount; provided that, if the Construction Phase Amendment or the agreement as to any Early Work includes an agreed upon lump sum, mark up or unit rate, those items are not open book after the date that amount is agreed upon.

**Other Contractor** means any contractor, tradesperson or other Person engaged by City to do work other than CMAR Firm and its Subcontractors.

**Parties** means City and CMAR Firm, and **Party** means each of them (as applicable) and includes its permitted successors and assigns.

**Payment Bond** means the Construction Phase Payment Bond.

**Performance Bond** means each of the Preconstruction Phase Performance Bond and Construction Phase Performance Bond, or each of them, as applicable.

**Permitting Plan** means the plan prepared by City and Design Engineer identifying Governmental Approvals required for the Project and including requirements applicable to CMAR Firm, as such plan may be updated from time to time.

**Person** means any individual, corporation, joint venture, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

**Phase** means Preconstruction Phase, Construction Phase or both of them (as applicable).

**Post-Completion Period** means the period of time commencing on the calendar day immediately following the Date of Completion of the Work and ending on the Acceptance Date.

**Preconstruction Phase** means the period (a) commencing on the issuance of NTP 1 and (b) ending on the earlier of the Date of Construction Phase Approval or the date of termination under Section 9.10, as applicable, during which the Preconstruction Phase Services are performed.

**Preconstruction Phase Bond** means the Preconstruction Phase Performance Bond.

**Preconstruction Phase Design Documentation** means:

- (a) the Basis of Design Report;
- (b) 30 percent plans and technical specifications;
- (c) 60 percent plans and technical specifications;
- (d) 90 percent plans and technical specifications; and
- (e) Project Plans and Specifications;

**Preconstruction Phase Milestone Deadlines** means

- (a) the dates specified in the Project Specific Information (Preconstruction Phase) for each Preconstruction Phase Milestone; and
- (b) the date or period of time approved, agreed between CMAR Firm and City and specified in the Project Specific Information for Early Work;

as such dates may be adjusted under this Agreement.

**Preconstruction Phase Milestones** means the milestones specified in the Project Specific Information (Preconstruction Phase) or any additional Early Work or milestones agreed or determined by City and specified in the Project Specific Information.

**Preconstruction Phase Performance Bond** has the meaning given in Section 6.1.

**Preconstruction Phase Project Schedule** means the schedule for the Preconstruction Phase Services prepared, updated and approved in accordance with the Contract Documents including the Scope of Work (Preconstruction Phase), which is based generally upon the Baseline Preconstruction Phase Schedule.

**Preconstruction Phase Services** means that part of the Work required to be performed during Preconstruction Phase in accordance with this Agreement, including any tasks required by any direction of the City Representative given or purported to be given under a provision of this Agreement, including any Change Order.

**Preconstruction Phase Services Fee** means the not-to-exceed price agreed upon by the Parties as the maximum compensation for Preconstruction Phase Services and initially specified in the Project Specific Information (Preconstruction Phase), as adjusted in accordance with this Agreement.

**Preconstruction Phase Site Investigation** means CMAR Firm's investigation of the Site in accordance with the Scope of Work (Preconstruction Phase), including all investigations as to geotechnical conditions, Hazardous Materials, Existing City Facilities and Utility Facilities required under the Scope of Work (Preconstruction Phase).

**Project** has the meaning given in Recital D to this Agreement.

**Project Assets** means the existing improvements at the Site, the Preconstruction Phase deliverables and the Construction Phase work product.

**Project Commissioning Plan** means the plan prepared and updated by CMAR Firm and the Design Engineer in accordance with the Contract Documents including Section I.F.6 of the Scope of Work (Preconstruction Phase), as approved by City.

**Project Goals** means the following goals adopted by City for the Project:

- (a) Early Contractor Involvement: Harness construction knowledge early in the Project to inform key decisions regarding design, existing condition mitigation, construction approach, sequencing, Early Work packages, etc.
- (b) O&M Coordination: Efficiently and safely construct the Project improvements while maintaining continuous, compliant operation of the VWRf.
- (c) Collaboration: Establish and maintain a collaborative environment among the City, Design Engineer, and CMAR Firm as the Project is designed and constructed.
- (d) Constructability / Value Engineering Input: Incorporate integrated constructability and value engineering input provided by CMAR Firm and Design Engineer.
- (e) Quality: Deliver the Project in a manner consistent with the Project design and specifications.
- (f) Cost: Minimize initial capital and life-cycle costs.

- (g) Schedule: Achieve substantial completion of the Project by December of 2026.
- (h) Achieve completion, including commissioning, start-up, and performance testing by February of 2027.
- (i) Risk: Achieve an optimal balance of risk allocation between the City and the CMAR Firm.
- (j) Safety: Implement a comprehensive safety program that incorporates industry's best practices.

**Project Plans** means the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Construction Phase Work, generally including Project-specific plans, elevations, sections, details, schedules and diagrams and Standard Plans, as identified in Exhibit 14 added to the Agreement by the Construction Phase Amendment.

**Project Schedule** means the most current version of:

- (a) for the Preconstruction Phase, the Baseline Preconstruction Phase Schedule or the Preconstruction Phase Project Schedule; and
- (b) for the Construction Phase, the Baseline Construction Phase Project Schedule or the Construction Phase Project Schedule.

**Project Specific Information** means the Project Specific Information (Preconstruction Phase) or the Project Specific Information (Construction Phase), or both of them, as applicable.

**Project Specific Information (Preconstruction Phase)** means the information included in Exhibit 1 (Project Specific Information (Preconstruction Phase)).

**Project Specific Information (Construction Phase)** means the document prepared and completed in accordance with Section 9.7 and included in the Construction Phase Amendment executed by the Parties in accordance with Section 9.8.3, based on the form attached as Exhibit 13 (Project Specific Information (Construction Phase)).

**Project Technical Requirements** means City's mandatory technical requirements for the Project, as described in Exhibit 1 (Project Technical Requirements Summary).

**Proposal** means CMAR Firm's proposal submitted in response to City's Request for Proposals for the Work, as modified and supplemented with City's approval prior to the Effective Date.

**Proposal Commitments** means the components of CMAR Firm's Proposal identified in Exhibit 3 (Proposal Commitments).

**Public Records Act** has the meaning given in Section 22.2.1.

**Quality Objectives** means to:

- (a) encourage best practice quality management through the planning, development, implementation and continuous improvement of quality assurance procedures, systems or frameworks during the Work;

- (b) prevent and minimize adverse quality impacts during the Work (including Defects before, at and after Completion); and
- (c) optimize the value for money achieved by City relating to the Project.

**Reasonable Investigation** means the following activities by appropriate, qualified professionals:

- (a) visit and visual, non-intrusive inspection of the Site and adjacent locations including inspection to identify the presence of other facilities, such as barriers, railing, structures, manholes or identifying markers;
- (b) review and analysis of all Reference Documents and online map tools;
- (c) review and analysis of the City-Provided Approvals and requirements for other Governmental Approvals;
- (d) reasonable inquiry with Utility Owners, including request for and review of plans provided by Utility Owners;
- (e) review and analysis of material Applicable Laws with respect to the Project Assets; and
- (f) other non-intrusive activities in accordance with Good Industry Practice that are sufficient to familiarize CMAR Firm with surface and subsurface conditions, including the presence of Utility Facilities, Hazardous Materials, archaeological, biological, paleontological and cultural resources, and threatened or endangered species, affecting the Site or surrounding locations,

provided that none of the foregoing activities requires conducting field studies, geotechnical investigations or original research of private records not contained or referenced in the Reference Documents.

**Recovery Schedule** means a schedule and narrative report that demonstrates CMAR Firm's proposed plan to regain lost schedule progress and shall demonstrate CMAR Firm's proposed plan to regain lost schedule progress and achieve the Milestone by the applicable Milestone Deadline and which complies with the requirements of Section 9.6.

**Reference Documents** means all drawings, reports, studies, data, documents, or other information, provided or made available to any CMAR-Related Entity by City, or which was obtained from or through any other sources prior to the Setting Date, including the documents and information provided with the RFP, other than the Contract Documents.

**Relief Event** means each of the following events:

- (a) a Change directed by City under this Agreement;
- (b) a City-Caused Delay;
- (c) a Change in Law;
- (d) a Force Majeure Event;

- (e) subject to Section 11.4, a Differing Site Condition;
- (f) performance of Hazardous Materials Management by CMAR Firm resulting from:
  - (i) Unknown Hazardous Materials; or
  - (ii) any spill of Hazardous Material by a third party who is not acting in a capacity of, on behalf, or under the authority or permission of a CMAR-Related Entity which: (A) is required to be reported to a Governmental Entity and (B) renders use of a construction area unsafe or potentially unsafe absent assessment, containment and/or remediation; and
- (g) subject to CMAR Firm complying with its obligations to coordinate with Other Contractors as described in this Agreement, any act or omission of any Other Contractor which materially and adversely directly affects CMAR Firm's obligations under this Agreement.

**Relief Event Notice** has the meaning given in Section 20.1.1.

**Request for GMP Proposal** means the request issued by City to CMAR Firm including relevant documentation required for the GMP Proposal and asking CMAR Firm to submit such proposal.

**Request for Proposals (RFP)** has the meaning given in Recital E to this Agreement.

**Retainage** has the meaning given in Section 18.16.1(a).

**Schedule of Values** means the schedule of values that CMAR Firm prepares, maintains and updates in accordance with Div 01 32 21, the Scope of Work (Construction Phase), Special Provisions and Project Plans and Specifications, as applicable.

**Risk Management Plan** means the plan prepared by CMAR Firm in accordance with Section I.F.4 of the Scope of Work (Preconstruction Phase), as approved by City and updated in accordance with the Contract Documents.

**Scope of Work** means each of the Scope of Work (Preconstruction Phase), Special Provisions, Project Plans and Specifications, or all of them, as applicable.

**Scope of Work (Preconstruction Phase)** means the portion of the Work to be performed during Preconstruction Phase described in Exhibit 2 (Scope of Work (Preconstruction Phase)), as amended in accordance with this Agreement.

**Setting Date** means, as applicable, each of the following:

- (a) for the Preconstruction Phase Services, , ten days prior to the date of issuance of the Request for Proposals;
- (b) for any Early Work, the date of City's request for a proposal for the Early Work or, if no proposal is requested, the date that is 30 days before the City issues the Change Order or Directive Letter for such Early Work]; and

- (c) for the Construction Phase Work, the date which is 30 days before the date of submittal of the GMP Proposal.

**Shop Drawings** means drawings showing details of manufactured or assembled products proposed to be incorporated into the Work.

**Site** means the site for the Work and temporary construction easements as depicted in Exhibit 11 added to this Agreement by the Construction Phase Amendment.

**Special Provisions** means the document included in Exhibit 14 added to this Agreement by the Construction Phase Amendment, providing additions and revisions to the Standard Specifications to establish conditions and requirements for the Construction Phase Work.

**Specifications** means the Standard Specifications included in Exhibit 14 added to this Agreement by the Construction Phase Amendment, as amended by the Special Provisions, and Reference Specifications referenced therein.

**State** means the state of California.

**Subcontract** means an agreement between CMAR Firm and one or more third parties providing for such third party to perform any part of the Work or provide any materials, equipment, labor or supplies for any part of the Work, or any such agreement between a Subcontractor and its lower tier Subcontractor at any tier.

**Subcontractor** means any Person (including a consultant, subcontractor or supplier) engaged by CMAR Firm to perform any part of the Work.

**Subcontractor Procurement Plan** means the plan setting out the procedures CMAR Firm will implement to procure Subcontractors to perform Work, as approved by City, as described in Section I.E.5 of the Scope of Work (Preconstruction Phase) and updated in accordance with the Contract Documents.

**Submittal** means any document, work product, or other written or electronic end product or item required to be prepared by CMAR Firm and delivered or submitted or resubmitted to City under this Agreement.

**Submittal Requirements** has the meaning given in Exhibit 4 (Submittal Requirements).

**Surety** means each properly licensed surety company, insurance company or other Person approved by the California State Insurance Commissioner to do business in the State and approved by City, which has issued the Payment Bond or the Performance Bond in accordance with this Agreement.

**Tables of Rates and Prices** means the tables of rates and prices attached to the applicable Project Specific Information, as may be updated in accordance with this Agreement.

**Target Cost of the Work** means the component of the GMP that consists of the estimated Cost of the Work plus the Cost of the Work Contingency and Allowance Values.

**Temporary Construction Easement** means any temporary easement or other temporary property right, if any, necessary for the performance of the Work.



**Test Plan** means the plan for testing the Project prepared by CMAR Firm in accordance with the Scope of Work (Construction Phase) and Div 01 75 17 (Commissioning), as approved by City.

**Time Impact Analysis** means the method as described in Div 01 32 21 to model and determine the impact of a delay to Project completion on the Construction Phase Project Schedule.

**Title 22** means Title 22, Division 4 of the CCR, as may be amended from time to time.

**Title 22 Recycled Water** means water produced by the VWP Program that: (a) meets all State requirements for a direct beneficial use or a controlled use that is compliant with Title 22; and (b) is disinfected tertiary recycled water that is filtered and subsequently disinfected.

**Unknown Hazardous Materials** means Hazardous Materials located in, on or under the Site as of the applicable Setting Date, excluding;

- (a) Known or Suspected Hazardous Materials;
- (b) Hazardous Materials resulting from a CMAR Firm Hazardous Materials Release;
- (c) asbestos or asbestos-containing materials (other than mineral asbestos naturally occurring in the ground) on or in the Site or any other materials not falling within the definition of Hazardous Materials that are encountered during or in connection with the demolition of buildings, fixtures or other improvements on any parcels within the Site;
- (d) quantities of Hazardous Materials that do not trigger a reporting requirement under Applicable Law; or
- (e) any Hazardous Materials on or affecting property outside of the Site, except to the extent such work is legally required to be taken with Hazardous Materials Management required within the Site.

**Utility Facility** means a privately, publicly, or cooperatively owned line, facility or system (including municipal and government lines, facilities and systems) for transmitting or distributing communications, cable television, power, electricity, gas, oil, crude products, water, steam, waste, or any other similar commodity, including any irrigation system and any fire or police signal system as well as streetlights. The necessary appurtenances to each utility facility shall be considered part of such utility.

**Utility Owner** means any private entity or public body (including city, county, state, public corporation, or public district) that owns and/or operates a Utility Facility, including cooperative utilities.

**VenturaWaterPure Program or VWP Program** means the City's program, located near the Project, which will recover, treat and reuse water that is currently discharged into the Santa Clara River Estuary.

**Warranty Period** has the meaning given in Section 13.6.1.

**Work** means all of the work, thing, tasks services and obligations which CMAR Firm is, or may be, required to do to comply with its obligations under this Agreement, including the Preconstruction Phase Services and the Construction Phase Work.

**Work Breakdown Structure (WBS)** means a breakdown of the Work, as approved by City in accordance with Section I.D.5 of the Scope of Work (Preconstruction Phase).

**Working Drawings** means drawings showing details not shown on the Plans which are required to be designed by CMAR Firm.

## 1.2 Interpretation

In this Agreement, unless the context otherwise requires, each of the following rules of interpretation shall apply:

- (a) this Agreement shall be construed simply, as a whole and in accordance with the fair meaning of the language used and not strictly for or against any Party;
- (b) the captions of the articles, sections, subsections, and clauses in this Agreement are for convenience only and are not to be treated or construed as part of this Agreement;
- (c) any word (including any defined term) in the singular includes the plural and vice versa, and any word denoting gender includes all genders;
- (d) a reference to a Section, Task or subsection is a reference to the Section, Task or subsection in the body of this Agreement, the Appendix or the Exhibit in which the reference appears, unless otherwise stated;
- (e) a reference to any Governmental Entity includes any public agency succeeding to the powers and authority of such Governmental Entity;
- (f) the terms “hereto,” “hereby,” “hereof,” “herein,” “hereunder,” “under this Agreement” and any similar terms refer to this Agreement;
- (g) a reference to an agreement (including this Agreement), document, standard, principle or other instrument includes a reference to that agreement, document, standard, principle or instrument as amended, supplemented, substituted, novated or assigned;
- (h) on plans, working drawings, and standard plans, calculated dimensions take precedence over scaled dimensions;
- (i) a reference to a right includes any benefit, remedy, discretion, authority or power associated with such right;
- (j) a reference to “\$” is to U.S. dollars, and all monetary amounts and obligations in this Agreement are expressed and payable in U.S. dollars;

- (k) unless otherwise expressly provided in this Agreement, the term “may,” when used in the context of a power or right exercisable by City or City Representative, means City or City Representative is able to exercise that right or power in its sole and unfettered discretion and has no obligation to CMAR Firm to do so;
- (l) a reference to a “day” is a reference to a working day, which is to a day other than (i) a Saturday or Sunday or (ii) a City-observed holiday; provided that requirements contained in this Agreement relating to actions to be taken in the event of an emergency and other requirements for which it is clear that performance is intended to occur on a non-working day, shall be performed as specified, even though the date in question may fall on a non-working day;
- (m) a reference to time is a reference to Pacific Time;
- (n) the words “include,” “including,” “includes,” and any variants of those words, will be read as if followed by the words “without limitation;”
- (o) the meaning of “or” will be that of the inclusive “or,” that is meaning one, some, or all of a number of possibilities;
- (p) unless otherwise expressly stated in this Agreement, words that have well-known technical or construction industry meanings are used in this Agreement in accordance with such recognized meaning;
- (q) a reference to any legislation (including any orders, regulations, by-laws, ordinances, orders, codes of practice or instruments made under the relevant legislation) or a provision within it includes any legislation or provision which amends, extends, consolidates or replaces such legislation or provision; and
- (r) if this Agreement requires calculation of an amount payable to a Party, there must be no double counting in calculating that amount.

### **1.3 Resolution of Ambiguities and Order of Precedence**

- 1.3.1 If there is a conflict between any of the Contract Documents, the order of precedence included in the Project Specific Information will apply.
- 1.3.2 If CMAR Firm discovers any ambiguity, discrepancy, inconsistency or other conflict within the Contract Documents, it shall promptly give notice in writing to the City. Within 14 days after receipt of that notice, the City Representative shall instruct CMAR Firm as to the course it must adopt and CMAR Firm shall comply with that instruction. CMAR Firm shall not proceed with any Work affected by a reported ambiguity, discrepancy, inconsistency or conflict until the issue is resolved in accordance with this Agreement.

## **2. OVERVIEW; NATURE OF AGREEMENT**

### **2.1 Overview**

City engages CMAR Firm to:

- (a) perform the Preconstruction Phase Services; and
- (b) subject to obtaining Construction Phase Approval, perform the Construction Phase Work.

### **2.2 Nature of Agreement**

The Parties wish to fully embrace the principles of collaboration and construction-manager-at-risk best practice in the performance of the Work and agree to employ the following techniques to maximize the benefits of this Agreement:

- (a) proceed on the basis of trust and good faith and create a culture of open and honest communication;
- (b) attempt to resolve disputes efficiently, in good faith, and at the earliest possible stage of dispute resolution;
- (c) establish a cooperative and collaborative environment where all parties (including City, Design Engineer, CMAR Firm and Subcontractors) have the opportunity to contribute their best efforts for the benefit of the Project as a whole rather than to the benefit of individual parties;
- (d) integrate the design team and construction teams (including City, Design Engineer, CMAR Firm, Major Subcontractors, key specialty contractors and trade partners) as early as possible into the design process;
- (e) utilize lean construction methods efficiently and effectively; and
- (f) maximize the value of Work delivered for the Preconstruction Phase Services Fee and the GMP (as applicable).

## **3. TERM**

This Agreement shall take effect on the Effective Date, and shall remain in effect until expiration of the Warranty Period or earlier termination.

## **4. REPRESENTATIONS AND WARRANTIES**

### **4.1 CMAR Firm's Representations and Warranties**

4.1.1 By executing this Agreement, CMAR Firm represents and warrants to City as follows:

- (a) all Work will be performed by or under the supervision of Persons who hold all necessary and valid authority, licenses, registrations,

certifications, and skills to perform the Work in the State, by personnel who:

- (i) are careful, skilled, experienced and competent in their respective trades or professions; and
  - (ii) are qualified to perform the Work in accordance with the Agreement;
- (b) the Work will comply with the requirements of the Contract Documents;
- (c) CMAR Firm familiarized itself with the requirements of Applicable Laws and the conditions of any Governmental Approvals required in connection with Preconstruction Phase and has no reason to believe that any Governmental Approvals required to be obtained by CMAR Firm will not be granted in due course and remain in effect so as to enable the Work to proceed in accordance with the Agreement;
- (d) CMAR Firm will keep the City Representative fully and regularly informed as to all matters affecting or relating to the Project Assets, including any matter which may change or which has changed:
  - (i) the nature, scope or timing of the Work; or
  - (ii) the possible levels of expenditure by City under this Agreement;
- (e) neither CMAR Firm nor the Key Personnel nor any principal of CMAR Firm or the Key Personnel is presently in arrears in payment of any taxes, permit fees or other statutory, regulatory or judicially required payments to the State related to the performance of any State contracts, or presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into, or otherwise participating in, this Agreement by any federal agency or by any department, agency or political subdivision of the State. For purposes of this subsection (e), the term “principal” means an officer, director, owner, partner, Key Person, employee, or other person in each case with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of CMAR Firm or any Key Person;
- (f) CMAR Firm is a ☐ duly authorized and validly existing under the laws of the State of California and will remain duly qualified and in good standing throughout the term of this Agreement and for as long as any obligations remain outstanding under this Agreement;
- (g) the execution and delivery of this Agreement and CMAR Firm’s performance of the Agreement have each been duly authorized by all necessary action of CMAR Firm’s governing body and each person executing this Agreement has been duly authorized to execute and deliver this Agreement on behalf of CMAR Firm;

- (h) no default under, violation of, or conflict with the governing instruments of CMAR Firm or any agreement, judgment or decree to which CMAR Firm is a party or is bound will result from (i) the execution and delivery by CMAR Firm of this Agreement, or (ii) performance by CMAR Firm of its obligations under this Agreement;
- (i) this Agreement has been duly executed and delivered by CMAR Firm and will not result in any judgment, decree, indenture, loan, credit agreement, or other material agreement or instrument to which CMAR Firm is a party or by which its properties and assets may be bound or affected;
- (j) there is no action, suit, proceeding, litigation, or investigation pending or to CMAR Firm's knowledge threatened against CMAR Firm that individually or in the aggregate either: (i) challenge CMAR Firm's authority to execute, deliver or perform or the validity or enforceability of any of the Agreement or which challenges the authority of the CMAR Firm's Representative executing this Agreement; or (ii) could reasonably be expected to result in any material adverse effect on the business, properties, or assets, or the condition, financial or otherwise, of CMAR Firm or in any impairment of its ability to perform the Work;
- (k) no organizational conflicts of interest exist with respect to CMAR Firm and its Subcontractors of any tier and there have been no organizational changes to CMAR Firm or its Subcontractors identified in its Proposal, which have not been approved in writing by City. For the purposes of this subsection (p), an "organizational conflicts of interest" means any organizational conflict of interest as described in the City's Conflict of Interest Policy or under Section 8.2 of the RFP; and
- (l) CMAR Firm, directly or indirectly, has not entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she/it has not received or paid, any sum of money or other consideration for the execution of this Agreement other than that which appears upon the face of this Agreement.
- (m) CMAR Firm and each Subcontractor performing construction Work shall be registered and maintain registration with the Department of Industrial Relations to perform public work pursuant to Section 1725.5 of the Labor Code.

#### **4.2 City Representations and Warranties**

City represents and warrants to CMAR Firm that:

- (a) City has the requisite power, authority and capacity to perform this Agreement, and to do all acts and things, and execute, deliver and perform all other agreements, instruments, undertakings and documents as are required by this Agreement to be done, executed, delivered or performed by City;

- (b) this Agreement has been duly authorized, executed, and delivered by City and constitutes a legal, valid, and binding obligation of City, enforceable against City in accordance with its terms; and
- (c) there is no action, suit, proceeding or litigation pending and served on City which challenges City's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement to which City is a party, or which challenges the authority of City official executing this Agreement.

## 5. FUNDING SOURCES

**[Note to Proposers: The below represents the current anticipated sources of funding. The list may be refined prior to the Proposal Due Date]**

- 5.1 CMAR Firm acknowledges that (a) the Project may be paid for with funds received through the WIFIA, SRF, United States Bureau of Reclamation, revenue bonds or other State or federal funding or grant programs (together "**Funding Programs**"), and (b) the application to receive those funds has been approved or may be approved after the Effective Date.
- 5.2 CMAR Firm shall provide or cause to be provided such information, documentation, and administrative assistance as City may request, and shall take such actions and execute such documents as are required to be in CMAR Firm's name (including any amendments required to this Agreement), to enable City to meet all requirements of the Funding Programs.
- 5.3 CMAR Firm shall comply with all terms provided in Exhibit 10 (Federal and State Requirements).

## 6. PERFORMANCE AND PAYMENT BONDS; GUARANTY

### 6.1 Preconstruction Phase Bonds

On or prior to the Effective Date, CMAR Firm shall provide City a performance bond in the amount specified in the Project Specific Information (Preconstruction Phase) and in the form of Exhibit 5A (Form of Performance Bonds) ("**Preconstruction Phase Performance Bond**")

### 6.2 Construction Phase Bonds

- 6.2.1 As a condition precedent to Construction Phase Approval, CMAR Firm shall provide City:
  - (a) a performance bond in the amount specified in the Project Specific Information (Construction Phase) and in the form of Exhibit 5A (Form of Performance Bonds) or in an alternative stand-alone form approved by City, in its sole discretion ("**Construction Phase Performance Bond**"); and
  - (b) a payment bond in the amount specified in the Project Specific Information (Construction Phase) and in the form of Exhibit 5B (Form of

Payment Bonds) or in an alternative stand-alone form approved by City, in its sole discretion (“**Construction Phase Payment Bond**”),

(together the “**Construction Phase Bonds**”).

- 6.2.2 In addition, as a condition to issuance of authorization to proceed with any Early Work, CMAR Firm shall provide City with a performance bond and a payment bond, each in the amount of 100% of the value of the Early Work, which bonds shall be based on the forms in Exhibit 5A (Form of Performance Bonds) and Exhibit 5B (Form of Payment Bonds), with appropriate changes as approved by City.

### **6.3 Warranty Bond**

Following Acceptance, CMAR Firm may replace the Construction Phase Performance Bond with a warranty bond in the amount specified in the Project Specific Information (Phase 2) and in the form of Exhibit 7C (Form of Warranty Bond).

### **6.4 Eligible Surety; Replacement Bonds; Increase in Bonds**

- (a) Each Bond provided under this Agreement shall be issued by an Eligible Surety, unless otherwise approved by City in its sole discretion.
- (b) If any Bond previously provided becomes ineffective, or if the Eligible Surety that provided the Bond no longer meets the requirements of this Agreement, CMAR Firm shall provide a replacement Bond in the same form issued by an Eligible Surety. CMAR Firm shall provide immediate notice to City both: (i) before such Bond is rendered ineffective or before such Bond’s surety is no longer an Eligible Surety, if CMAR Firm has Actual Knowledge that either of the foregoing may occur; and (ii) immediately after such occurrence, but in no case later than two days thereafter.
- (c) If the Preconstruction Phase Services Fee or GMP (as applicable) is increased in connection with a Change Order or Modification, City may require a corresponding proportionate increase in the amount of any Bond, a new Bond, or alternative security to cover such Change Order.

### **6.5 No Relief of Liability**

Notwithstanding any other provision of this Agreement, performance by a Surety or Guarantor of any of the obligations of CMAR Firm shall not relieve CMAR Firm of any of its outstanding or unperformed obligations under this Agreement.

### **6.6 Guaranty**

- (a) Each Guarantor shall provide and maintain a guaranty, in the form of Exhibit 8 (Form of Guaranty), in full force and effect throughout the term of this Agreement.



- (b) CMAR Firm shall periodically report to City regarding the financial capacity of each Guarantor, which reports shall be made no less frequently than quarterly or upon any adverse change to such financial capacity.
- (c) If, at any point during the course of this Agreement, a Guarantor's financial capacity is materially negatively affected, as determined by City in its good faith discretion, City may require, and CMAR Firm shall provide, one or more additional guarantees so that the combined financial capacity of the Guarantor and any additional guarantors provide equivalent security to City as the guaranty provided as of the Effective Date. Each such guaranty shall be substantially in the form provided in Exhibit 8 (Form of Guaranty), together with appropriate evidence of authorization, execution, delivery and validity of such guarantee.
- (d) The guaranty described above assures CMAR Firm's obligations under this Agreement and shall be maintained in full force and effect throughout the term of the Agreement and for so long as CMAR Firm has any obligations under the Agreement, including those obligations expressly surviving termination of the Agreement as provided in Section 30.5.

## **7. PERSONNEL**

### **7.1 Designation of Representatives**

- 7.1.1 City and CMAR Firm shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to this Agreement.
- 7.1.2 The initial designations for the City Representative and CMAR Firm's Representative are included in the Project Specific Information (Preconstruction Phase).

### **7.2 City Representative**

- 7.2.1 The City Representative will give directions and carry out all other functions of the City Representative under this Agreement.
- 7.2.2 CMAR Firm shall comply with any direction by the City Representative given or purported to be given under a provision of the Contract Documents.
- 7.2.3 Except where the Contract Documents expressly provide otherwise, City Representative may give a direction orally but will as soon as practicable confirm such direction in writing.
- 7.2.4 City may, by notice to CMAR Firm, at any time, replace City Representative or appoint persons to exercise any of the City Representatives functions under this Agreement. The initial designations for exercise of City Representative functions are included in the Project Specific Information (Preconstruction Phase).

### 7.3 CMAR Firm's Representative

- 7.3.1 CMAR Firm shall ensure that the CMAR Firm's Representative is present at the Site at all times reasonably necessary to ensure that CMAR Firm is complying with its obligations under this Agreement.
- 7.3.2 CMAR Firm will be deemed to have received any direction given to the CMAR Firm's Representative.
- 7.3.3 CMAR Firm may replace the CMAR Firm's Representative in accordance with Section 7.4 of this Agreement.

### 7.4 Key Personnel for the Work

CMAR Firm shall:

- (a) employ and utilize the Key Personnel in the jobs and for the time periods specified in the Contract Documents;
- (b) subject to Section 7.4(c), not replace any Key Person without the City Representative's prior written approval; and
- (c) if any Key Person resigns from CMAR Firm's employment, is unavailable due to disability, leave of absence, death, promotion, termination, replacement for-cause or is otherwise unavailable, replace such person with a person of at least equivalent experience, ability and expertise, who is approved, in writing, by the City Representative (in its sole discretion) prior to such replacement.

### 7.5 Key Personnel Liquidated Damages

- 7.5.1 If any person filling a Key Person's role is not available for, or actively involved in, the performance of the Work as required in Section 7.4, as determined by City in its good faith discretion, then:
  - (a) CMAR Firm acknowledges that City and the Project will suffer significant and substantial damages and that it is impracticable and extremely difficult to ascertain and determine the actual damages which would accrue to City in such event; and
  - (b) City may, in its sole discretion, impose upon CMAR Firm a liquidated amount as follows, for each position held by such individual, as deemed compensation to City for such damages:

POSITION	LIQUIDATED AMOUNT
Project Manager	\$150,000
Construction Manager	\$100,000
Quality Manager	\$100,000

- (c) City may, in its sole discretion, impose upon CMAR Firm for the positions listed above an additional liquidated amount equal to the corresponding amount specified in Section 7.5.1(b) for each six-month period where such Key Person's position is vacant or not being fulfilled in accordance with this Agreement as determined by City. Additionally, City may impose upon CMAR Firm a liquidated amount of \$20,000 in the same manner for any other Person proposed to perform a key role under the Proposal. Any liquidated amount imposed under this Section 7.5.1(c) will be payable from CMAR Firm to City for each six-month period where such Person's position is vacant or not being fulfilled in accordance with this Agreement as determined by City.

7.5.2 CMAR Firm is not liable for liquidated damages under Section 7.5.1 if:

- (a) CMAR Firm removes or replaces any individual filling a Key Person's role at the direction of City; or
- (b) the individual filling a Key Person's role is unavailable due to death, retirement, injury, illness, parental leave, leave of absence, disability or no longer being employed by the applicable CMAR-Related Entity (provided that moving to an affiliated company or a Subcontractor is not considered grounds for avoiding liquidated damages),

provided that in either scenario above, CMAR Firm promptly proposes to City a satisfactory replacement for such individual for review and approval within 30 days of unavailability, and City in its sole discretion approves that replacement.

## **8. MEETINGS; SUBMITTALS; RELIANCE ON REVIEW AND INSPECTION**

### **8.1 Meetings**

- 8.1.1 CMAR Firm acknowledges that the delivery of the Project will take place in close proximity to, and require coordination with, the VWP Program, Other Contractors and Utility Owners to complete the Project and integrate it with other projects being delivered by the City.
- 8.1.2 CMAR Firm shall attend meetings as specified in the Scope of Work (Preconstruction Phase) and the Special Provisions.
- 8.1.3 Before each progress meeting, the CMAR Firm's Representative shall prepare and issue an agenda for the meeting, and after each such meeting, the CMAR Firm's Representative shall prepare and issue minutes of that meeting to City; provided that City may (at its sole discretion) designate another Person to prepare and issue agendas and/or minutes.

### **8.2 Submittals**

CMAR Firm shall prepare, submit, update and maintain all Submittals in accordance with the requirements of this Agreement, including the Submittal Requirements.

### 8.3 Management Plans

Without limiting any of the Submittal Requirements, CMAR Firm shall:

- (a) prepare, submit, update and maintain Management Plans in accordance with the Scope of Work (Preconstruction Phase), the Specifications and the Submittal Requirements;
- (b) perform the Work in accordance with the then current approved versions of the Management Plans;
- (c) after each Management Plan has been finalized, regularly review, update and amend each Management Plan in accordance with the Scope of Work; and
- (d) submit all Management Plans (including updates) to City in accordance with the Submittal Requirements.

### 8.4 No Obligation to Review

8.4.1 CMAR Firm acknowledges and agrees that City's rights under this Agreement to review, comment on, approve, disapprove, monitor, inspect, test, accept, or carry out any other act of City in connection with any Submittal or the Project Assets exist solely for the benefit and protection of City.

8.4.2 Except as expressly set out in this Agreement, City does not assume or owe any duty of care to CMAR Firm to:

- (a) review, comment on, approve, disapprove, monitor, inspect, test, accept or carry out any other act or omission of City in connection with any Submittal or the Project Assets; or
- (b) inspect or review the Project Assets for Defects or any other nonconformance with this Agreement.

8.4.3 Failure of City to review, comment on, approve, disapprove, monitor, inspect, test, accept or carry out any other act or omission of City in connection with any Submittal or the Project Assets shall not:

- (a) relieve CMAR Firm from, or alter or affect, its liabilities, obligations or responsibilities, whether under this Agreement or under Applicable Laws, including its obligations to perform the Work in accordance with this Agreement, or any of its warranty or indemnity obligations under this Agreement;
- (b) prejudice City's rights against CMAR Firm, whether under this Agreement or under Applicable Laws;
- (c) be deemed or construed as any kind of representation or warranty, express or implied by City, or be relied upon by CMAR Firm in determining whether CMAR Firm has satisfied the requirements of this Agreement;

- (d) be asserted by CMAR Firm against City as a defense, legal or equitable, to CMAR Firm's obligation to satisfy the requirements of this Agreement; or
- (e) preclude or estop City from asserting or showing that the Work or materials do not comply with this Agreement or recovering from CMAR Firm and its Guarantor(s) or Surety(ies) such damages as City may sustain in connection with CMAR Firm's failure to comply or to have complied with this Agreement.

8.4.4 Notwithstanding the provisions of Sections 8.4.1 through 8.4.3, CMAR Firm may rely on written notices that City gives under this Agreement for purposes of confirming City's approval or consent to an event or matter, but without prejudice to any of City's other rights and remedies under this Agreement.

8.4.5 City shall use reasonable endeavors to notify CMAR Firm if City does not intend to review, comment on, approve, disapprove, monitor, inspect, test, accept or carry out any other act of City in connection with any Submittal or the Project Assets.

## **8.5 Covering of Work**

8.5.1 Before covering any part of the Project Assets, CMAR Firm shall provide written notice to the City Representative. After receipt of such notice, City Representative shall have 10 days to notify CMAR Firm that inspection and/or testing of such part of the Project Assets is required before it is covered. If the City Representative provides such notice, CMAR Firm shall provide City and any other Persons designated by City a full and adequate opportunity to inspect and test such part of the Project Assets before it is covered. Notwithstanding the foregoing, at all times during the term of this Agreement, CMAR Firm shall remove or uncover such portions of the finished or covered Project Assets as directed by the City Representative for inspection and/or testing by City and any other Persons designated by.

- (a) If, after such inspection and/or testing, the Project Assets exposed or examined are found to not be in accordance with this Agreement:
  - (i) CMAR Firm shall rebuild, repair or replace the Project Assets in accordance with this Agreement; and
  - (ii) recovery of any delay occasioned by such examination shall be at CMAR Firm's cost.
- (b) If, after such inspection and/or testing, the Project Assets exposed or examined are found to be in accordance with this Agreement, Section 8.6.2 shall apply.

8.5.2 If CMAR Firm fails to provide the notice and opportunity to inspect and test required under Section 8.5.1, then City may order any Work done or materials used to be uncovered, removed, repaired, restored or replaced by City at CMAR

Firm's cost and without an entitlement to a Claim, even if the Work proves to be in compliance with this Agreement after uncovering.

## **8.6 Inspections and Tests by CMAR Firm**

8.6.1 CMAR Firm shall carry out all inspections and tests of the Project Assets required by this Agreement or as directed by the City Representative.

8.6.2 If the City Representative directs CMAR Firm to carry out an inspection or test of the Project Assets which:

(a) either:

(i) is not otherwise required by this Agreement; or

(ii) does not relate to a Defect for which the City Representative gave an instruction under Section 13.1.2, and

(b) the results of the inspection or test show the Project Asset is in accordance with this Agreement,

then the Preconstruction Phase Services Fee or GMP, as applicable, shall be increased pursuant to a Change Order in an amount of the extra Cost of the Work reasonably incurred by CMAR Firm which arise directly from the City Representative's inspection or test, as determined by the City Representative in accordance with Section 21.3(a)(i)C.

## **9. PLANNING; PRECONSTRUCTION PHASE; CONSTRUCTION PHASE**

### **9.1 Scope of Work (Preconstruction Phase) and Proposal Commitments**

9.1.1 CMAR Firm:

(a) warrants that the Proposal Commitments comply with the Scope of Work (Preconstruction Phase) and the other requirements of the Contract Documents; and

(b) acknowledges that the Scope of Work (Preconstruction Phase) and the Proposal Commitments:

(i) do not limit CMAR Firm's obligations under the Contract Documents or otherwise under Applicable Laws; and

(ii) may require updating and refining throughout the performance of the Work to the extent that either does not reflect all the tasks and other things to be done or provided to perform the Work in accordance with this Agreement or to reflect any Change Order.

### **9.2 Commencement of Preconstruction Phase Services**

9.2.1 CMAR Firm shall not commence any Preconstruction Phase Services until City has issued NTP 1. CMAR Firm acknowledges and agrees that:

- (a) City has no obligation to issue NTP 1; and
- (b) unless and until NTP 1 is issued, City has no liability to CMAR Firm under this Agreement.

9.2.2 Subject to Section 9.2.1(a), City shall issue NTP 1 upon satisfaction of the applicable conditions in the Project Specific Information (Preconstruction Phase).

9.2.3 Upon City's issuance of NTP 1, CMAR Firm shall:

- (a) commence to plan and perform the Preconstruction Phase Services in consultation and coordination with City and the Design Engineer;
- (b) provide City and the Design Engineer with all assistance it may reasonably require in connection with the Work, before the Construction Phase Approval Deadline; and
- (c) take all practicable steps to achieve:
  - (i) the Preconstruction Phase Milestones by the relevant Preconstruction Phase Milestone Deadlines; and
  - (ii) Construction Phase Approval before the Construction Phase Approval Deadline.

### **9.3 Preconstruction Phase General Obligations**

9.3.1 During Preconstruction Phase, CMAR Firm shall engage and work in a collaborative, efficient and coordinated manner with City, Design Engineer and the Project stakeholders to:

- (a) carry out pre-construction services and prepare all relevant Preconstruction Phase Submittals in accordance with this Agreement and otherwise specified by City in writing;
- (b) review and comment on draft Preconstruction Phase Design Documentation and Plans and Specifications;
- (c) prepare and submit to City all Submittals required for each Preconstruction Phase Milestone no later than the applicable Preconstruction Phase Milestone Deadline and otherwise in accordance with the Scope of Work (Preconstruction Phase);
- (d) update City estimates and forecasts regarding the Project and provide data to City to reflect real time information and provide all pricing, estimates and other data on an Open Book Basis;
- (e) implement a controls system approved by City and capable of being broken down and reported in several different work breakdown structures, including organizing the financial data by cost element codes, subcontracts, vendors, construction packages, etc.;

- (f) coordinate the development of the GMP Cost Model with the Design Engineer's development of the Preconstruction Phase Design Documentation and Plans and Specifications; and
- (g) undertake such risk reduction studies and actions as are required by the Scope of Work (Preconstruction Phase) or as are necessary, in accordance with Good Industry Practice, for the comprehensive, safe and accurate planning, scoping, costing and programming of the Work during Preconstruction Phase.

#### **9.4 Requirements for Preconstruction Phase Milestones**

9.4.1 Each Preconstruction Phase Milestone Submittal shall take into account:

- (a) City's proposed budget for the Project;
- (b) the Project Goals;
- (c) City's desire to reduce the cost and time to achieve Completion (on the one hand) while obtaining a high-quality project that meets the Lifecycle Objectives and Quality Objectives;
- (d) all opportunities for cost savings in accordance with Good Industry Practice without derogating from the achievement of the other requirements of this Agreement; and
- (e) any other relevant considerations, which the City Representative may from time to time specify to CMAR Firm in writing.

#### **9.5 Project Schedule**

9.5.1 CMAR Firm shall undertake and complete the Work in accordance with the applicable Project Schedule.

9.5.2 CMAR Firm shall:

- (a) submit, update and maintain each Project Schedule in accordance with the requirements of the Contract Documents;
- (b) include all applicable Milestones and Milestone Deadlines in each Project Schedule;
- (c) include sufficient time to obtain Governmental Approvals before they are required to commence the applicable Work;
- (d) obtain City's prior written approval for each Project Schedule, and once so approved, only revise the Project Schedule with the prior written approval of City; and
- (e) update the Project Schedule as required in Section 9.5.2(a) and at least within 14 days of any of the following:



- (i) changes to the Project Schedule; or
- (ii) delays (including Relief Events and Change Orders) which may have occurred,

and submit that schedule to the City Representative for review and approval in accordance with the Submittal Requirements.

9.5.3 CMAR Firm's failure to incorporate all elements of the Work required for the performance of this Agreement or any other inaccuracy in the Project Schedule shall not excuse CMAR Firm from performing all Work (and all portions of the Work) within the applicable times specified under this Agreement.

9.5.4 City may rely on the Project Schedule in planning and conducting ongoing operations and other work at the Site.

9.5.5 CMAR Firm acknowledges and agrees that if CMAR Firm fails to timely provide City with any updated and accurate Project Schedule when due, City may withhold any payment otherwise due to CMAR Firm until City receives that updated and accurate Project Schedule.

9.5.6 City's approval of a Project Schedule shall not:

- (a) imply City's acceptance of any particular performance or construction methods, or relieve CMAR Firm from its responsibility to provide sufficient materials, equipment and labor to guarantee completion of the Project (or any portion thereof) in accordance with this Agreement;
- (b) attest to the validity of assumptions, activities, relationships, sequences, resource allocations or any other aspect of the applicable Project Schedule;
- (c) imply that CMAR Firm is entitled to any Change Order extending a Milestone Deadline or adjusting any Preconstruction Phase Services Amount or GMP (as applicable) or portion thereof; or
- (d) modify this Agreement.

9.5.7 CMAR Firm's failure to include any element of Work required by this Agreement in the applicable Project Schedule shall not relieve CMAR Firm's responsibility to perform that element of Work.

9.5.8 The City and CMAR Firm mutually agree that time is of the essence with respect to the dates and times specified in the Agreement.

## **9.6 Recovery Schedule**

9.6.1 Without limiting CMAR Firm's obligations to update the Construction Phase Project Schedule in accordance with the Contract Documents, if at any time, the Work is delayed for a period that exceeds either:

- (a) 10 days in the aggregate; or
- (b) a number of days in the aggregate that is equal to or greater than 5% of the days remaining until a Milestone Deadline,

then, within five days after CMAR Firm first becomes aware of such delay or otherwise at the request of City, CMAR Firm shall prepare and submit a Recovery Schedule to City for review and approval.

9.6.2 Within five days after receipt of a Recovery Schedule, City shall notify CMAR Firm whether the Recovery Schedule is approved or rejected. Within five days after City's rejection of a Recovery Schedule, CMAR Firm shall resubmit a revised Recovery Schedule incorporating City's comments.

9.6.3 Within five days after City's approval of a Recovery Schedule, CMAR Firm shall incorporate and fully include such Recovery Schedule into the Construction Phase Project Schedule, and perform the Work so as to achieve the Recovery Schedule.

9.6.4 If:

- (a) CMAR Firm fails to provide City with an acceptable Recovery Schedule; and
- (b) the delay does not relate to a Relief Event,

then, within 30 calendar days after CMAR Firm's receipt of written notice of its failure to obtain City's approval of a Recovery Schedule, City may withhold up to 10% from each payment owing to CMAR Firm thereafter until CMAR Firm prepares and City reviews and approves a Recovery Schedule.

## 9.7 Early Work

City may at any time require City to provide a proposal for performance of Early Work identified by City and may issue a Change Order or Directive Letter for performance of such Work, even though CMAR Firm has not yet obtained Construction Phase Approval. In such case:

- (a) the Change Order or Directive Letter shall specify each such part of the Work that will be Early Work;
- (b) the relevant provisions of this Agreement will apply to all Early Work as if it were the only work included in the Work;
- (c) the Change Order or Directive Letter shall include an update to the Project Specific Information (Construction Phase) specifying Milestone Deadline(s), conditions to Completion, Completion Deadline, liquidated damages under Sections 12.5 and 17.8, Target Cost of the Work, Construction Phase Fixed General Conditions Cost, CMAR Firm's Fee, CMAR Firm's Contingency, insurance requirements provided in Exhibit 9B (Insurance Requirements – Construction Phase), and premiums for bonds and insurance; and

- (d) the Change Order or Directive Letter may include such other terms and conditions as deemed appropriate by City.

## **9.8 Construction Phase Amendment and Construction Phase Approval**

### **9.8.1 By no later than the Construction Phase Approval Deadline:**

- (a) the Parties shall negotiate in good faith to seek to reach an agreement on all details to be included in the Construction Phase Amendment, and City shall issue a Request for GMP Proposal to CMAR Firm; and
- (b) CMAR Firm shall prepare a proposed Construction Phase Amendment setting out the details agreed in Section 9.8.1(a) and submit the proposed Construction Phase Amendment to City for review and approval in accordance with the Submittal Requirements.

9.8.2 Upon review of the Construction Phase Amendment and other Submittals, the City Representative shall have sole discretion to determine that all conditions to Construction Phase Approval have been met and to seek approval of the Construction Phase Amendment from the City Council. If the City Council determines that Construction Phase Approval has been achieved, the City will issue a written notice to CMAR Firm stating the date upon which Construction Phase Approval was achieved ("**Date of Construction Phase Approval**").

9.8.3 Subject to obtaining approval from the City Council, the Parties shall execute the Construction Phase Amendment and from that point in time references to "Agreement" will be references to that amended contract, under which CMAR Firm will complete (to the extent not completed during Preconstruction Phase) the Construction Phase Work.

9.8.4 If City determines that Construction Phase Approval will not be provided, then City will issue a written notice to CMAR Firm stating that Construction Phase Approval has not occurred and Section 9.10 shall apply.

## **9.9 CMAR Firm Acknowledgements and Warranties Regarding Construction Phase Approval**

### **9.9.1 CMAR Firm acknowledges and agrees that:**

- (a) unless directed otherwise by Change Order, CMAR Firm may not proceed with the Construction Phase Work (except to the extent completed in Preconstruction Phase) unless Construction Phase Approval has occurred;
- (b) the division of Work into Preconstruction Phase and Construction Phase is solely for the benefit of City, to enable use of a delivery methodology allowing award of the Agreement prior to determination of the GMP;
- (c) neither the City Representative nor City is required to exercise its discretion to determine Construction Phase Approval for the benefit of CMAR Firm;

- (d) no provision of this Section 9 conferring sole discretion upon City or the City Representative gives CMAR Firm any rights (including any right to make any Claim arising out of the exercise or failure to exercise the discretion); and
- (e) the exercise or failure to exercise such sole discretion is not capable of being the subject of a Dispute or otherwise subject to review.

9.9.2 By executing the Construction Phase Amendment, CMAR Firm acknowledges its Reasonable Investigation of the Site and participation in the development of the Special Provisions, Project Plans and Specifications and represents and warrants to City as follows:

- (a) the representations and warranties in Section 4.1 continue to apply;
- (b) in accordance with Good Industry Practice, CMAR Firm has reviewed and analyzed the Special Provisions, Project Plans and Specifications, has evaluated the constraints affecting the Construction Phase Work, and has reasonable grounds for believing and does believe that performance of the Construction Phase Work in accordance with the Contract Documents will not exceed the GMP and can be performed within the Construction Phase Project Schedule;
- (c) CMAR Firm familiarized itself with the requirements of Applicable Laws and the conditions of any Governmental Approvals required in connection with Construction Phase and has no reason to believe that any Governmental Approvals required to be obtained by CMAR Firm will not be granted in due course and remain in effect so as to enable the Work to proceed in accordance with the Agreement;
- (d) the costs included in the GMP Proposal are allowable in accordance with cost principles in 2 CFR Part 200 subpart E, and the GMP Proposal does not include any costs that are expressly unallowable under federal cost principles;
- (e) CMAR Firm will use all commercially reasonable efforts to ensure that it achieves: (i) Completion of the Construction Phase Work so as not to exceed the GMP; and (ii) each Construction Phase Milestone by the applicable Construction Phase Milestone Deadline; and
- (f) except as expressly provided in this Agreement, if the Construction Phase Work cannot be completed for the agreed GMP, any additional costs shall be the responsibility of CMAR Firm, and CMAR Firm hereby assumes liability for such costs without reimbursement by City.

#### **9.10 Failure to Achieve Preconstruction Phase Milestone or to Obtain Construction Phase Approval**

9.10.1 If, due to no breach of CMAR Firm's obligations under this Agreement:

- (a) any Preconstruction Phase Milestone is not achieved within 20 calendar days after the applicable Preconstruction Phase Milestone Deadline;
- (b) the City fails to take appropriate steps within 20 calendar days after the Construction Phase Approval Deadline to request City Council approval of the Construction Phase Amendment; or
- (c) the City Council elects not to proceed with the Construction Phase Amendment,

then, subject to Section 9.10.2 and upon notice to that effect being provided by City, City may terminate this Agreement for convenience under Section 26 and the terms applicable to a termination for convenience shall apply, including as provided in Section 27; provided that in the event of a termination for convenience prior to City Council approval of the Construction Phase Amendment, City's maximum liability to CMAR Firm shall be the Preconstruction Phase Services Fee.

9.10.2 If, due to a breach of CMAR Firm's obligations under this Agreement,

- (a) any Preconstruction Phase Milestone is not achieved by the applicable Preconstruction Phase Milestone Deadline; or
- (b) the City Representative determines that the conditions to Construction Phase Approval have not been met by the Construction Phase Approval Deadline,

then City may terminate this Agreement under Section 25.4 and the terms applicable to a Default Termination Event shall apply, including as provided in Section 27.

## **9.11 Commencement of Construction Phase Work**

9.11.1 Other than Early Work performed in accordance with Section 9.7, CMAR Firm shall not commence any Construction Phase Work until after City has issued NTP 2. CMAR Firm acknowledges and agrees that:

- (a) City has no obligation to issue NTP 2; and
- (b) unless and until NTP 2 is issued, City has no liability to CMAR Firm for the Construction Phase Work under this Agreement.

9.11.2 Subject to Section 9.11.1(a), City shall issue NTP 2 upon satisfaction of the applicable conditions to NTP 2 in the Project Specific Information (Construction Phase).

9.11.3 Upon City's issuance of NTP 2, CMAR Firm shall:

- (a) commence to plan and perform the Construction Phase Work in consultation with City, Design Engineer and in accordance with the Contract Documents;

- (b) take all practicable steps to achieve the Construction Phase Milestones by the relevant Construction Phase Milestone Deadlines; and
- (c) provide City with such other assistance as the City Representative may require in connection with the Project Assets before Acceptance.

## 9.12 Availability

CMAR Firm shall keep available on the Site, and any area off-Site where the Work is being carried out, for the use of the City Representative, City or anyone else acting on behalf of City one complete set of the Contract Documents and all other Books and Records directed in writing by the City Representative.

## 9.13 Cost Control

CMAR Firm shall:

- (a) achieve Completion of the Work and Acceptance, so that the amounts payable to CMAR Firm under Section 18 do not exceed the Preconstruction Phase Services Fee or GMP (as applicable);
- (b) without limiting Section 9.13(a), review the GMP Proposal and any other cost model submissions (each a “**Cost Submission**”) with the City Representative as the Design Engineer proceeds with development of the Special Provisions, Project Plans and Specifications, to:
  - (i) ensure that the applicable Cost Submission is consistent with requirements for the Construction Phase Work; and
  - (ii) advise the City Representative how the scope of the Work should or can be modified to ensure that the cost of performing the Construction Phase Work will be consistent with the applicable Cost Submission; and
- (c) institute a system of cost control and, together with the City Representative, review and, where approved by the City Representative, amend the applicable Cost Submission to take account of any item affecting or likely to affect any component of the Cost Submission, and advise the City Representative as to the alternative steps available where:
  - (i) the proposals for any subcontracted part of the Work exceed the amount included for that work in the applicable Cost Submission; or
  - (ii) the Cost of the Work exceeds (or appear likely to exceed) the amount allowed for that Work in the GMP Proposal.

#### **9.14 Constructability**

The CMAR Firm shall attend such design and other meetings as required by the City Representative to assist these designers in preparing the Plans and Specifications and to advise upon:

- (a) constructability issues;
- (b) the choice and availability of materials to be incorporated in the Work;
- (c) equipment and/or packaging of the Work to advance construction;
- (d) quantity calculations to verify quantities specified by Design Engineer; and
- (e) the sufficiency and completeness of the Plans and Specifications.

### **10. GOVERNMENTAL APPROVALS**

#### **10.1 Compliance**

CMAR Firm shall comply with all Governmental Approvals in performing the Work.

#### **10.2 City-Provided Approvals**

City will obtain, at no cost to CMAR Firm, all City-Provided Approvals identified in the Project Specific Information. CMAR Firm shall provide or cause to be provided such information, documentation, and assistance as the City may require, and shall take such actions as are reasonably required by the City in order for the City to obtain all City-Provided Approvals.

#### **10.3 Governmental Approvals to be Obtained by CMAR Firm**

##### **10.3.1 CMAR Firm shall:**

- (a) apply for, obtain and maintain all Governmental Approvals (excluding the City Provided Approvals);
- (b) promptly give the City Representative copies of all documents (including Governmental Approvals and other notices) that any authority, body or organization having jurisdiction over the Project Assets issues to CMAR Firm; and
- (c) comply with all applicable requirements of the Permitting Plan.

10.3.2 City shall, to the extent City is reasonably able, cooperate with CMAR Firm and provide or cause to be provided such limited information, documentation, and administrative assistance as CMAR Firm may reasonably request in connection with the Work to obtain Governmental Approvals.

10.3.3 Neither City, nor any City member is obligated to: (a) exercise its legal rights in order to avoid or eliminate the requirement to obtain any Governmental

Approvals; or (b) grant Governmental Approvals for which it is the authorizing entity. City will apply its usual procedures and criteria in considering applications from CMAR Firm for such Governmental Approvals.

## **11. ACCESS; DIFFERING SITE CONDITIONS; HAZARDOUS MATERIALS**

### **11.1 Access to Site**

11.1.1 City shall furnish the Site for specified purposes by the following dates:

- (a) the date of NTP 1, with respect to portions of the Site required for the Preconstruction Phase Services; and
- (b) the date of NTP 2, with respect to portions of the Site required for the Construction Phase Work,

provided City may, at its sole discretion, make a portion of the Site available at any time prior to the applicable date above, subject to such terms and conditions as may be specified by City.

11.1.2 CMAR Firm shall obtain access to any areas outside of the Site to which access is required to perform any portion of the Work.

11.1.3 City has no obligations or responsibilities with respect to the acquisition, maintenance or disposition of such property rights or interests, and CMAR Firm shall cause the documentation of any such property rights or interest to contain the grantor's express acknowledgment that City has no liability with respect to such acquisition, maintenance or disposition.

11.1.4 City is not required to provide CMAR Firm exclusive access to the Site or any other City property, except as otherwise provided by City in the form of an advance written approval, which approval may be withheld in City's reasonable discretion.

### **11.2 CMAR Firm's Obligation to Provide Access to City**

In carrying out the Work, CMAR Firm shall:

- (a) at all reasonable times give City, the City Representative, Other Contractors, Utility Owners and any person authorized by City or the City Representative access to the Project Assets or any areas off-Site where the Work is being carried out;
- (b) provide City and the City Representative with every reasonable facility necessary for the supervision, examination, inspection and testing of the Project Assets; and
- (c) answer all questions of, cooperate with and do everything reasonably necessary to assist the City Representative or anyone else acting on behalf of City in performing the obligations under this Agreement.



## **11.3 Process to Follow upon Discovery of Certain Site Conditions**

### **11.3.1 Notification to City**

- (a) If CMAR Firm discovers or becomes aware of any of the following on the Site, (1) any Hazardous Materials required to be removed or treated in accordance with this Agreement or Applicable Laws, (2) any Differing Site Conditions, or (3) any other protected resources that may affect the Work, CMAR Firm shall immediately:
  - (i) notify City by telephone or in person, to be followed immediately by written notice; and
  - (ii) except where CMAR Firm is required to take immediate action under this Agreement or Applicable Laws, stop Work and secure the area unless the materials are Known or Suspected Hazardous Materials in which case Section 11.5.1 will apply.
- (b) CMAR Firm's notice under Section 11.3.1(a)(i) shall:
  - (i) specify the nature of the discovery; and
  - (ii) advise City of any obligation to notify Governmental Entities under Applicable Laws or Governmental Approvals.
- (c) Except where CMAR Firm is required to take immediate action under this Agreement or Applicable Laws, City shall have three days after receiving written notice under Section 11.3.1(a)(i) to inspect the area and consult with CMAR Firm about the recommended approach before any other action is taken that would inhibit City's ability to ascertain the nature and extent of the discovery.

### **11.3.2 City Response**

- (a) Upon receipt of written notice under Section 11.3.1(a)(i), City will:
  - (i) view the location and conduct such further investigation as City deems appropriate; and
  - (ii) use reasonable efforts to provide, promptly, and in no event later than three days after receiving written notice under Section 11.3.1(a)(i), written notice to CMAR Firm as to whether Work should be resumed, whether further investigation is required, and whether additional action is required to be undertaken by CMAR Firm. If Hazardous Materials are involved, City's notice shall describe the Hazardous Materials Management, if any, that CMAR Firm is to undertake with respect to such Hazardous Materials.

- (b) If any Governmental Approval specifies a procedure to be followed that differs from the procedure in this Agreement, CMAR Firm shall follow the procedure in the Governmental Approval.

#### **11.4 Differing Site Conditions**

CMAR Firm shall be entitled to relief for a Relief Event involving Differing Site Conditions subject to the limitations in Sections 19 through 21.

#### **11.5 Hazardous Materials**

11.5.1 CMAR Firm shall, as required:

- (a) test, contain, manage, treat, handle, store, remediate, remove, transport (where applicable), document and dispose of Hazardous Materials; and
- (b) perform all other aspects of Hazardous Materials Management as appropriate, in accordance with Applicable Laws, Governmental Approvals, and all provisions of this Agreement.

11.5.2 Where a discovery of Hazardous Materials relates to quantities that trigger any reporting, investigation, remediation, other response action requirements under any Applicable Laws or Governmental Approvals, CMAR Firm shall work with City and Design Engineer to develop a plan for Hazardous Materials Management, which shall provide for reasonable steps to be taken by CMAR Firm, including modifications to construction techniques to avoid excavation, dewatering or other active, intrusive management in areas where Hazardous Materials are encountered.

11.5.3 Where excavation or dewatering of Hazardous Materials within the scope of the Work is unavoidable, CMAR Firm shall use appropriately trained personnel and shall select the most cost-effective approach to Hazardous Materials Management, unless otherwise directed by City.

11.5.4 CMAR Firm shall not cause or contribute to Hazardous Materials within the Site or any other land, air or water or cause or contribute to any Hazardous Materials emanating from the Site.

11.5.5 CMAR Firm shall be entitled to relief for a Relief Event involving Hazardous Materials Management (as described in subsection (f) of the definition of “Relief Event”) in accordance with and subject to the limitations in Sections 19 through 21.

#### **11.6 Hazardous Materials Generator**

11.6.1 Subject to Section 11.6.2, as between CMAR Firm and City, City shall be considered the generator and assume generator responsibility for: (a) Known or Suspected Hazardous Materials; (b) any spill of Hazardous Material by a third party who is not acting in a capacity of, on behalf or under the authority or permission of a CMAR-Related Entity; and (c) any Unknown Hazardous Materials.

- 11.6.2 Section 11.6.1 does not alter or modify CMAR Firm's obligation to undertake all Hazardous Materials Management, specifically including the hazardous waste management responsibilities found at 40 CFR Part 261. CMAR Firm may list City as the "generator" under Applicable Laws of materials covered under Section 11.6.1 on all manifests and other waste tracking records.
- 11.6.3 CMAR Firm shall propose to City the destination facility to which existing or third party-generated Hazardous Materials will be transported. City shall exercise reasonable discretion regarding selection of such destination facilities.
- 11.6.4 This Section 11.6 does not preclude or limit any rights or remedies that City may have against any Governmental Entity or other third parties, including prior owners, lessees, licensees and occupants of properties on or under which Hazardous Materials exist under Sections 11.6.1.
- 11.6.5 Notwithstanding the foregoing, CMAR Firm (and not City) shall be considered the generator and assume generator responsibility for performing the obligations and all Losses associated with any CMAR Firm Hazardous Materials Release for which CMAR Firm is responsible under Section 24.2.1(d).

## **11.7 Other Conditions Impacting Site**

- 11.7.1 If any meeting regarding a proposed excavation is required under California Government Code section 4216.2(c), CMAR Firm shall provide no less than 14 days' advance written notice to the City Representative so that the City Representative and/or other City designated representative(s) or agent(s) may attend.
- 11.7.2 CMAR Firm shall comply with any waste diversion requirements under Applicable Laws concerning materials removed from the Site which are required to be diverted to a recycling center rather than an area landfill.

## **12. GENERAL OBLIGATIONS APPLICABLE TO THE WORK**

### **12.1 General Obligations Applying to the Work**

- 12.1.1 CMAR Firm shall perform the Work and deliver the Project:
  - (a) in accordance with all Applicable Laws and Governmental Approvals;
  - (b) so that all Construction Work shall be performed as set out in this Agreement, be free from Defects and conform to Good Industry Practice;
  - (c) so as to provide City complete Facilities meeting the requirements of the Contract Documents;
  - (d) such that all materials furnished in connection with the Work shall be of good quality and new, unless otherwise specified in the Contract Documents, when installed;

- (e) so as to ensure that adequate materials, equipment and resources are available to ensure uninterrupted progress of the Work and compliance with the requirements of this Agreement under normal conditions and reasonably anticipated abnormal conditions; and
  - (f) otherwise in accordance with this Agreement.
- 12.1.2 CMAR Firm acknowledges that City is relying upon the expert advice, skill and judgment of CMAR Firm in carrying out its obligations under this Agreement and would not have entered into this Agreement but for CMAR Firm's expertise in that regard.
- 12.1.3 CMAR Firm shall control, coordinate, administer and direct all activities necessary to plan, design, commence, construct, commission / start up, complete and hand over the Facilities.
- 12.1.4 CMAR Firm shall comply with all applicable requirements in any third party agreement between City and any Governmental Entity related to the Work.

## **12.2 Suspension by City**

- 12.2.1 The City Representative may instruct CMAR Firm to suspend and, after a suspension has been instructed, to re-commence the carrying out of all or a part of the Work. The City Representative is not required to exercise such authority for the benefit of CMAR Firm.
- 12.2.2 If a suspension under this Section 12.2 arises as a result of CMAR Firm's failure to properly carry out any of its obligations under this Agreement, CMAR Firm will not be entitled to:
  - (a) include any costs incurred as a result of the suspension in the applicable Cost of the Work; or
  - (b) any adjustment of the applicable Preconstruction Phase Services Fee or GMP.
- 12.2.3 If a suspension under this Section 12.2 arises due to a cause other than CMAR Firm's failure to carry out its obligations in accordance with this Agreement, such suspension shall be deemed a suspension for convenience by City and shall be subject to subsection (e) of the definition of "City-Caused Delay."
- 12.2.4 CMAR Firm may not suspend the Work, unless instructed to do so under this Section 12.2, as permitted under Section 25.6, or in the event of an emergency. For purposes of the foregoing, an "emergency" is an unplanned event within or immediately adjacent to the Site that: (i) causes or has the potential to have a material adverse impact on the Project; (ii) presents an immediate or imminent threat to the long term integrity of any part of the Project, the Environment, to property immediately adjacent to the Project or to the safety of the public; or (iii) is recognized or declared to be an emergency by the Governor of the State, the Federal Emergency Management Administration (FEMA), the U.S. Department

of Homeland Security or other Governmental Entity with authority to declare an emergency.

### **12.3 Conditions Applicable to Construction Work**

Without limiting Section 12.1 or the other provisions of this Section 12.3, CMAR Firm shall perform the Construction Work in accordance with:

- (a) this Agreement, including the Project Plans and Specifications; and
- (b) any Working Drawings and Shop Drawings reviewed and approved by City in accordance with the Submittal Requirements.

### **12.4 Cooperation with Other Contractors, Utility Owners, and City**

12.4.1 CMAR Firm acknowledges that the Work will require coordination with City and other Persons, including coordination with:

- (a) City's ongoing operations of the Existing City Facilities; and
- (b) the VWP Program and the Other Contractors and Utility Owners performing work on the VWP Program or in close proximity to the Project.

12.4.2 In performing the Work, CMAR Firm shall:

- (a) permit Other Contractors and Utility Owners to perform their work;
- (b) promptly inspect work already in place or subsequently performed by Other Contractors and Utility Owners during the term of this Agreement and report to the City Representative any problems with that work relating to its connection with the Project;
- (c) communicate and schedule access to Work areas with Other Contractors and Utility Owners so as to maximize the efficiency with which all work is performed. In the event of any conflict affecting use of the Site or the performance, coordination or scheduling of the Work with the work of Other Contractors or Utility Owners or any other Persons designated by the City, City shall make the final determination as to the resolution of that conflict and CMAR Firm shall comply with City's determination;
- (d) ensure personnel of City, the Design Engineer, and other Persons designated by City are able to safely and conveniently access the Existing City Facilities in a manner that allows for the ongoing and uninterrupted operation of the Existing City Facilities; and
- (e) carefully and fully coordinate, cooperate and interface the Work (including the storage of any materials or equipment used in connection with the Work) so as to avoid inconveniencing, interfering with, disrupting or delaying:
  - (i) the VWP Program;

- (ii) City, the work of Other Contractors, Utility Owners and any person authorized by City or the City Representative to occupy, use, operate, maintain or access the Site; and
  - (iii) operation, maintenance and function of existing elements located at or in the vicinity of the Site, including the Existing City Facilities.
- 12.4.3 As instructed by the City Representative, CMAR Firm shall restrict its personnel and operations to the immediate Work areas at the Site and in no way go beyond any applicable Work area limits designated as such by the City Representative from time to time.
- 12.4.4 City may occupy or utilize any portion of the Project Assets at any time and before the Date of Completion of the Work. Such occupancy or use shall not constitute acceptance of any part of Work covered by this Agreement nor shall it relieve or otherwise reduce CMAR Firm's responsibilities under this Agreement.

## **12.5 Liquidated Damages for Loss of Use of Existing City Facilities**

- 12.5.1 If, as a result of any CMAR Firm Fault, the VWRF is unable to operate in whole or part for its intended use, including receiving wastewater flows, producing Title 22 Recycled Water, and distributing Title 22 Recycled Water to the recycled water distribution system ("**VWRF Unavailability**"), CMAR Firm shall pay liquidated damages at the rate of \$4.29 per hundred cubic feet of affected flow, for every day or part thereof, that the VWRF remains unable to operate for such intended use during the term of this Agreement until the VWRF is able to commence such intended operation.
- 12.5.2 Except for other remedies expressly provided in this Agreement, including CMAR Firm's obligation to repair damage and City's right to be indemnified for third party Claims, the liquidated damages under Section 12.5.1 shall constitute City's sole right to monetary damages for City's inability to produce water due to any VWRF Unavailability.
- 12.5.3 The Parties agree that the liquidated damages (a) are reasonable and represent good faith estimates and evaluations by the Parties as to the actual, potential damages or harm City would incur as a result of a VWRF Unavailability, and (b) do not constitute a penalty.

## **12.6 Safety**

- 12.6.1 CMAR Firm shall:
  - (a) perform the Work safely and in a manner that: (i) does not put the health and safety of persons at risk; (ii) protects property; and (iii) complies with the Health and Safety Plan and the requirements of the Contract Documents;
  - (b) ensure the Site is in a safe condition, at the completion of Work each day; and

- (c) erect and properly maintain at all times, as required by field conditions and progress of Work, all necessary safeguards, signs, barriers, lights, and watchmen for protection of workers and the public, and shall post danger signs warning against hazards created in the course of the Work.

12.6.2 If the City Representative reasonably considers there is a risk to the health or safety of people or damage to property relating to the Work, the City Representative may direct CMAR Firm to change its manner of working or to cease working.

## **12.7 Plant, Equipment or Other Work**

CMAR Firm shall not remove from the Site any plant, equipment or other work (i.e., such items used, or work undertaken, by CMAR Firm to construct the Work that will not form part of the Work), without the City Representative's prior written approval, except as provided in Section 12.8(b).

## **12.8 Clean Up**

CMAR Firm shall:

- (a) in carrying out the Work, keep the Site clean and tidy and free of refuse; and
- (b) as a condition precedent to Completion, clean up and remove all rubbish, materials and plant, equipment or other work from the part of Site relevant to the Work or any Early Work and leave that part of the Site in a safe condition.

## **12.9 Necessary Protection**

City may take any action necessary to protect the Work, other property, or the environment, or to prevent or minimize risks to the health and safety of persons, which CMAR Firm is required to, but does not take.

Any Losses suffered or incurred by City in taking such action will be a debt due from CMAR Firm to City.

## **12.10 City Right to Act**

City may, either itself or by a third party, carry out an obligation under this Agreement that CMAR Firm was obliged to carry out, but which it failed to carry out within the time required in accordance with this Agreement.

Any Losses suffered or incurred by City in carrying out such obligation will be a debt due from CMAR Firm to City.

## 12.11 Access Hours

Unless otherwise agreed in writing by CMAR Firm and the City Representative, the access hour limitations for performance of Work on the Site are as specified in the Project Specific Information.

## 12.12 Title and Risk of Loss

12.12.1 CMAR Firm warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools and supplies provided, or to be provided, by it and its Subcontractors that become part of the Project, free and clear of all Liens.

12.12.2 Title to all such materials, equipment, tools and supplies delivered to the Site shall pass to City, free and clear of all Liens, upon:

- (a) payment by City to CMAR Firm of invoiced amounts pertaining to such materials, equipment, tools and supplies; and
- (b) the sooner of either (i) incorporation into the Project or (ii) acceptance by City.

12.12.3 Notwithstanding any passage of title under Section 12.12.2 and except as otherwise expressly provided in this Agreement:

- (a) from and after the Date of Construction Phase Approval or commencement of any Early Work through Acceptance or earlier termination of this Agreement, CMAR Firm:
  - (i) bears the risk of loss or damage to the Project Assets;
  - (ii) shall take every reasonable precaution against loss or damage to the Project Assets from any cause, whether arising from the performance or nonperformance of the Work;
  - (iii) shall repair, restore and replace loss or damage to the Project Assets from any cause; and
  - (iv) shall, except as otherwise provided in the Contract Documents, promptly repair, restore and replace any loss or damage to property of or work performed by City (including the Existing City Facilities), any Utility Owner or any Other Contractor that is damaged due to a CMAR Firm Fault, to its condition immediately prior to the occurrence of such damage or such other condition as may be approved by City, in its sole discretion; and
- (b) from and after the Effective Date until Acceptance or earlier termination of this Agreement, CMAR Firm bears all risks of loss or damage to and shall repair, restore and replace any loss or damage to:
  - (i) any tools, machinery, equipment, facilities, materials, inventory,



supplied, protective fencing, job trailers, scaffolding or other items of any CMAR-Related Entity used in the performance of the Work but not intended for permanent installation into the Facilities;

- (ii) any machinery, equipment, facilities, materials, inventory, supplies and other property of any CMAR-Related Entity outside the Site; or
- (iii) any machinery, equipment, facilities, materials, inventory, supplies and other property of any CMAR-Related Entity while in transit to the Site.

## **12.13 Project Utilities**

### **12.13.1 CMAR Firm shall:**

- (a) provide all necessary communications for the Work, except as otherwise provided in the Contract Documents;
- (b) provide all fuel required for performance of the Construction Work;
- (c) provide for the purchase of power or provide portable power for the Work, except in connection with Acceptance Testing or as otherwise provided in the Contract Documents;
- (d) provide suitable light for Construction Work conducted at night or under conditions of deficient daylight to ensure proper Construction Work and to afford adequate facilities for inspection and safe working conditions;
- (e) subject to Section 12.13.1(f), obtain all water used on the Project, except as otherwise provided in the Contract Documents; and
- (f) supply all equipment necessary to ensure the sufficient pressure and flow rate of all water needed to complete the Construction Work.

12.13.2 Any temporary connections for electricity shall be subject to approval of City and the Utility Owner representative.

## **12.14 Bonds for Utility-Related Work by CMAR Firm**

12.14.1 To the extent that CMAR Firm will be performing Work relating to Utility Facilities, if requested by the relevant Utility Owner may, CMAR Firm shall:

- (a) add the Utility Owner as an additional obligee to the Payment Bonds and Performance Bonds, to the extent of the Work performed relating to its Utility Facilities; provided that the Payment Bonds and Performance Bonds continue to cover the full amounts required by City, with no riders that reduce City's potential of recovery; or
- (b) provide separate bonds satisfactory to the Utility Owners to cover such Work.

12.14.2 CMAR Firm shall procure from and provide all information necessary for the bonds required under Section 12.14.1 to the surety(ies) providing such bonds.

### **12.15 CMAR Firm Accepts All Risk**

Except as otherwise expressly provided in this Agreement (including CMAR Firm's express entitlement to make claims for Relief Events in accordance with this Agreement) or Good Industry Practice:

- (a) CMAR Firm accepts all risks in connection with delivering the Project consistent with this Agreement; and
- (b) CMAR Firm is not entitled to make any Claim against City in connection with the Project, the Project Assets or this Agreement.

### **12.16 Damage to Property**

CMAR Firm shall protect from damage or loss the Existing Facilities and existing property, structures, Utilities, curbs, walks, drives, trees, shrubs, lawns and landscape work of third parties on or adjacent to the Site or affected by its activities and shall provide such guards, protection and covering as is necessary. CMAR Firm shall immediately notify City and affected third parties of any damage or loss to their property arising out of the Work. Damaged or lost items shall be rebuilt, repaired or replaced to their prior condition; provided, however that any damaged property of third parties shall be rebuilt, repaired or replaced to any better or different condition to the extent required by Applicable Laws or by any preexisting third party agreement between the property owner and City. CMAR Firm shall either perform such rebuild, repair or replacement itself, or the affected property owner may elect to rebuild, repair or replace at CMAR Firm's expense. Should CMAR Firm not rebuild, repair or replace such damaged or lost items (or not reimburse a property owner electing to do its own rebuild, repair or replacement), City may take corrective measures and may deduct the amount of such costs (including an administrative charge equal to 10% of the costs) from any sums owed by City to CMAR Firm pursuant to this Agreement and/or obtain reimbursement from CMAR Firm for such costs (plus an administrative charge equal to 10% of the costs).

## **13. DEFECTS**

### **13.1 Defects**

13.1.1 Subject to Sections 13.1.2(b) and 13.1.2(c), CMAR Firm shall correct all Defects.

13.1.2 If, prior to the expiration of the Warranty Period for the Work or any Early Work, the City Representative discovers or believes there is a Defect, the City Representative may give CMAR Firm an instruction specifying the Defect and doing one or more of the following:

- (a) requiring CMAR Firm to correct the Defect, or any part of it, and specifying the time within which this must occur;

- (b) requiring CMAR Firm to carry out a Change Order to overcome the Defect, or any part of it, and specifying the time within which this must be carried out; or
- (c) advising CMAR Firm that City will accept the work, or any part of it, despite the Defect.

### **13.2 Correction of Defect or Change Order**

If an instruction is given under Section 13.1.2(a) or 13.1.2(b), CMAR Firm shall correct the Defect or carry out the Change Order:

- (a) within 10 days, unless a longer time period is specified in the City Representative instruction; and
- (b) if after Completion, at times and in a manner which cause as little inconvenience to the occupants and users of the Work or any Early Work as is reasonably possible.

### **13.3 Claim for Correction of Defect**

Where an instruction is given under Section 13.1.2(a):

- (a) CMAR Firm will only be entitled to make a Claim for correcting the Defect (or the relevant part) if the Defect (or the relevant part) is something for which CMAR Firm is not responsible; and
- (b) where CMAR Firm is so entitled to make a Claim, the work involved in the correction of the Defect will be treated as if it were a Change Order issued by the City Representative under Section 21.2.

### **13.4 Claim for Change Order**

If a Change Order has been issued under Section 13.1.2(b) and:

- (a) CMAR Firm is not responsible for the Defect (or the relevant part), then the cost of the Change Order will be valued in accordance with Section 21.3; or
- (b) CMAR Firm is responsible for the Defect (or the relevant part), then the City Representative will determine the cost of correcting the Defect (or the relevant part) as if Section 21.2 applied and that cost will be a debt due from CMAR Firm to City.

### **13.5 Defects Discovered during Warranty Period**

If:

- (a) an instruction is given under Section 13.1.2(c) prior to the expiration of the Warranty Period; and
- (b) CMAR Firm is responsible for the Defect (or the relevant part),

the amount determined by the City Representative which represents the cost of correcting the Defect (or the relevant part) will be a debt due from CMAR Firm to City.

### **13.6 Warranty Period; Extension of Warranty Period**

13.6.1 Unless otherwise stated, all warranty periods shall commence upon the earlier of Acceptance or earlier termination and shall continue for the period specified in the Project Specific Information (Preconstruction Phase), as may be extended by Section 13.6.5 ("**Warranty Period**").

13.6.2 CMAR Firm shall furnish City with all warranty and guarantee documents prior to the earlier of Acceptance or earlier termination as follows:

- (a) in both electronic and hard copy format;
- (b) for the hard copy, in a single tabbed binder organized according to the City Representative's directions; and
- (c) otherwise in accordance with the Submittal Requirements.

13.6.3 City shall notify CMAR Firm, in writing, within a reasonable time after the discovery of any failure, Defect, or damage subject to a warranty or guarantee. CMAR Firm shall commence and perform with due diligence all necessary Work to complete or correct the Work at issue within the timeframe specified under Section 13.2(a), except in the event of any emergency, in which case CMAR Firm's obligation to commence and perform the Work shall be immediate. If CMAR Firm fails or is unable to promptly remedy any failure, Defect, or damage, then City shall have the right to replace, repair, or otherwise remedy the same, and the cost of such remedy will be a debt due from CMAR Firm to City.

13.6.4 With respect to all warranties, express or implied, from Subcontractors, manufacturers, or suppliers for Work performed and materials furnished under this Agreement, CMAR Firm shall:

- (a) obtain for City all warranties that would be given in normal commercial practice or that are required under the Contract Documents;
- (b) require all warranties to be executed, in writing, for the benefit of City; and
- (c) enforce all warranties for the benefit of City until the end of the Warranty Period unless otherwise directed in writing by City.

13.6.5 If:

- (a) the City Representative gives CMAR Firm an instruction under either Section 13.1.2(a) or during the Warranty Period; and
- (b) CMAR Firm is responsible for the Defect (or the relevant part),

then the Warranty Period will be extended only for that specific Work required to correct the Defect (or the relevant part) by the period set out in the Project Specific

Information (Preconstruction Phase), commencing upon completion of the correction of the Defect (or the relevant part).

- 13.6.6 If this Agreement terminates prior to Construction Phase Acceptance, any warranty or guarantee documents to be provided by CMAR Firm shall be provided on the basis that CMAR Firm had complied with all of its obligations in connection with this Agreement up to the time of termination and taking into account the circumstances and timing of the termination.

### **13.7 Common Law Rights Not Affected**

- 13.7.1 Neither City's rights nor CMAR Firm's liability with respect to a Defect, whether under this Agreement or under Applicable Laws with respect to any Defect, whether before or after the expiration of the Warranty Period, will be affected or limited by:

- (a) the rights conferred upon City or the City Representative by under any provision of this Agreement;
- (b) the failure by City or the City Representative to exercise any such rights; or
- (c) any instruction of the City Representative under Section 13.1.2.

- 13.7.2 Nothing under this Agreement shall limit City's remedies under Applicable Laws or otherwise, including with respect to latent defects, gross mistakes, or fraud. City specifically reserves all rights related to defective work, including rights to any defect claims under California Code of Civil Procedure section 337.15.

## **14. LIFECYCLE OBJECTIVES AND QUALITY OBJECTIVES**

### **14.1 Lifecycle Objectives and Quality Objectives**

Without limiting any other CMAR Firm obligation, CMAR Firm shall:

- (a) perform the Work to maximize the achievement of the Lifecycle Objectives and Quality Objectives;
- (b) prepare each Submittal in a manner that maximizes the achievement of the Lifecycle Objectives and Quality Objectives; and
- (c) with each preliminary and/or draft Management Plan required to be submitted to City under the Contract Documents, submit to City a summary of how the applicable Management Plan addresses the requirement provided under Section 14.1(b).

### **14.2 Consultation**

CMAR Firm shall meet with the City Representative, City, the Design Engineer, and Other Contractors at such times as the City Representative may require from time to time to:

- (a) review the progress of the design and construction of the Work against the Lifecycle Objectives and Quality Objectives; and
- (b) consult with the City Representative, City, the Design Engineer and Other Contractor(s) as to any designs, materials or methods of construction which they might recommend to maximize the achievement of the Lifecycle Objectives and Quality Objectives.

## **15. SUBCONTRACTORS AND SUBCONTRACTS; EEO; LABOR; DBE**

### **15.1 Subcontractor Selection; Assignment of Subcontracts to City**

- 15.1.1 Unless otherwise agreed by the City Representative in writing, all Subcontractors shall be selected in accordance with the Subcontractor Procurement Plan.
- 15.1.2 The following procedures shall be incorporated into the Subcontractor Procurement Plan with respect to solicitation of Subcontracts by CMAR Firm for construction Work, including Subcontracts for fabrication and installation of a portion of the Work, and excluding Subcontracts with any of the Listed Subcontractors identified in Appendix 3 to Exhibit 1.
  - (a) CMAR Firm shall (i) provide notice of the availability of work to be subcontracted in accordance with its Subcontractor Procurement Plan; and (ii) provide a fixed date and time on which the subcontracted work will be awarded.
  - (b) CMAR Firm must obtain at least two bids from qualified firms and shall undertake good faith efforts to obtain participation by DBE firms.
  - (c) CMAR Firm shall promptly notify City in writing of the identity of each Subcontractor selected and, upon City's request, provide the solicitation and evaluation materials and results. No Subcontractor performing Construction Work may start any Work until after City receives a copy of such Subcontractor's valid California contractor's license and DIR registration.
  - (d) If any Listed Subcontractor is a company affiliated with CMAR Firm, CMAR Firm shall require such Subcontractor to follow the procedures under this Section 15.1.2 in connection with lower tier Subcontracts for construction Work.
  - (e) CMAR Firm shall not subcontract for performance of any of the Work designated for performance by CMAR Firm in the Proposal or the GMP Proposal, unless otherwise approved in writing by City.
- 15.1.3 CMAR Firm shall ensure that all Subcontract proposal processes and documentation are conducted:
  - (a) in accordance with the principles of the City Procurement Policy, Applicable Laws and the Subcontractor Procurement Plan;

- (b) on terms which achieve value for money outcomes for City; and
- (c) with the highest standards of probity, fairness and equal opportunity.

15.1.4 CMAR Firm hereby assigns to City all its interest in first-tier Subcontracts now or hereafter entered into by CMAR Firm for performance of any part of the Work. The assignment will be effective upon acceptance by City in writing and only as to those Subcontracts which City designates in writing. City may accept said assignment at any time during the course of the Work and prior to Acceptance in the event of a suspension or termination of CMAR Firm's rights under this Agreement. Such assignment is part of the consideration to City for entering into this Agreement with CMAR Firm and may not be withdrawn prior to Acceptance.

## **15.2 Responsibility for Subcontracts**

CMAR Firm is responsible for:

- (a) the engagement and management of each Subcontract;
- (b) all Work performed by its Subcontractors;
- (c) proper supervision and coordination of the Work performed by its Subcontractors so as to ensure that all Work is in accordance with this Agreement; and
- (d) the actions, errors, omissions, negligence, willful misconduct, or breach of any Applicable Law or contract by any CMAR-Related Entity, as though CMAR Firm directly employed all such CMAR-Related Entities and any Person acting on its behalf.

## **15.3 Listed Subcontractors; Subcontract Modifications; Substitution of Subcontractors**

- 15.3.1 The Listed Subcontractors are entitled to certain protections in accordance with the City Procurement Policy.
- 15.3.2 CMAR Firm may not terminate any Listed Subcontract or modify the scope of a Listed Subcontractor's work without City's prior written consent, which City may grant or withhold in its good faith discretion. Notwithstanding the foregoing, City agrees that CMAR Firm may terminate a Major Subcontract in the event of material default by the Subcontractor holding that Major Subcontract if CMAR Firm has provided notice of such intended termination to City at least 15 days in advance of that termination.
- 15.3.3 CMAR Firm shall not make any substitution of any Listed Subcontractor, except in accordance with the provisions of the Subletting and Subcontracting Fair Practices Act, Public Contract Code section 4100 et seq. and provided the proposed replacement has at least equivalent experience, ability and expertise, and is approved, in writing, by the City Representative (in its sole discretion) prior to such replacement.

- 15.3.4 City may require a new procurement in lieu of permitting a modification to the scope of an existing Subcontract.

#### **15.4 Subcontract Requirements**

Each Subcontract shall be consistent in all respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Subcontractors. Subcontracts with Listed Subcontractors shall include express requirements provided under this Section 15.4.

- 15.4.1 The Subcontract shall name City as a third party beneficiary of the Subcontract, with the independent right to enforce all of the terms of the Subcontract for its own benefit and shall state that all guarantees and warranties, express or implied, inure to the benefit of City and its respective successors and assigns.
- 15.4.2 The Subcontract shall assign CMAR Firm's rights under the Subcontract to City, contingent only upon delivery of notice from City following default by CMAR Firm or termination or expiration of this Agreement, and shall allow City to assume the benefit of such rights with liability only for those remaining CMAR Firm obligations accruing after the date of City's assumption.
- 15.4.3 The Subcontract shall require the Subcontractor to recognize and attorn to City upon receipt of notice from City that it has exercised its rights under this Agreement, without necessity for consent or approval from CMAR Firm or for a determination of whether City validly exercised its rights. The Subcontract shall include CMAR Firm's express covenants to waive and release any claim or cause of action against the Subcontractor in connection with its recognition and attornment in reliance on any such notice from City. CMAR Firm hereby waives such claims and causes of action.
- 15.4.4 For Books and Records, the Subcontract shall require the Subcontractor:
- (a) to maintain usual and customary Books and Records for the type and scope of operations of business in which the Subcontractor is engaged (e.g., constructor, equipment supplier, designer, service provider) for no less than the longest time period provided under Section 22;
  - (b) to permit audits and interviews to be conducted by CMAR Firm, City and such other Persons identified in Section 22.1.5 on no less than the same terms provided under Section 22.1; and
  - (c) to warrant the completeness and accuracy of all information the Subcontractors or its agents provide in connection with the Work and the Subcontract.
- 15.4.5 The Subcontract shall require the Subcontractor:
- (a) to provide progress reports to CMAR Firm appropriate for the type of work the Subcontractor is performing sufficient to enable CMAR Firm to provide the reports it is required to provide City under this Agreement;



- (b) to maintain all appropriate licenses;
- (c) to be registered and maintain registration to perform public work under Labor Code section 1725.5, as applicable, and to give notice and information to the next higher tier Subcontractor (or to CMAR Firm, for direct Subcontracts) regarding any labor dispute that may delay performance under this Agreement, with CMAR Firm responsible for notifying City of such potential delay;
- (d) to participate in meetings between CMAR Firm and City concerning matters pertaining to the Subcontract or the Subcontractor's Work, upon notice from CMAR Firm after City's request; and
- (e) to carry out its scope of work in accordance with this Agreement, applicable Governmental Approvals and Applicable Laws, and to be joined in any dispute resolution proceeding under Section 28 if City determines such joinder is reasonably necessary to resolve the Dispute.

15.4.6 The Subcontract shall not allow for its assignment without CMAR Firm's prior written consent.

15.4.7 The Subcontract shall provide CMAR Firm with the right to terminate the Subcontract in whole or in part upon any termination for convenience of this Agreement without liability of CMAR Firm or City for the Subcontractor's Consequential Damages, or other damages (except for Subcontractor's undisputed Work duly performed up to the date of termination).

15.4.8 The Subcontract shall include:

- (a) a standard of professional responsibility or standard for commercial practice (as applicable) equal to or better than the requirements of this Agreement and Good Industry Practice;
- (b) warranties, guaranties, and liability provisions of the contracting party in accordance with Good Industry Practice;
- (c) effective procedures for claims and change orders, which procedures are consistent with the Change Order process in this Agreement;
- (d) the provisions required under Exhibit 10D (State Requirements);
- (e) the following term:

"Nothing contained herein shall be deemed to create any privity of contract between or among City and the Subcontractor, nor does it create any duties, obligations, or liabilities on the part of City to the Subcontractor except those allowed under California law. In the event of any claim or dispute arising under the Subcontract and/or CMAR Firm's contract with City, the Subcontractor shall look only to CMAR Firm for any payment, redress, relief, or other satisfaction. The Subcontractor hereby waives

- any claim or cause of action against City arising out of the Subcontract or otherwise arising in connection with the Subcontractor's work;"
- (f) the prompt payment requirements in Section 18.17 and a requirement that the Subcontractor make payments to sub-subcontractors and suppliers in a similar manner;
  - (g) provisions consistent with Public Contract Code section 9204(d)(5), which provides that a Subcontractor may request in writing, either on its own behalf or on behalf of a lower tier subcontractor, that CMAR Firm present a claim for work which was performed by the Subcontractor or by a lower tier subcontractor on behalf of the Subcontractor, and in such event the Subcontractor must furnish reasonable documentation to support the claim, and within 45 days of receipt of that written request, CMAR Firm is required to notify the Subcontractor in writing as to whether CMAR Firm presented the claim to City and, if CMAR Firm did not present the claim, provide the Subcontractor with a statement of the reasons for not having done so; and
  - (h) all other provisions required by this Agreement.

## **15.5 Requirements Applicable to Major Subcontracts**

In addition to the other requirements specified in the Agreement, including this Section 15 each Major Subcontract shall be subject to the following:

- 15.5.1 Each proposed Major Subcontract shall be submitted to City for review and approval in accordance with the Submittal Requirements. No Major Subcontract shall be executed without City's prior written approval of the Subcontractor and the terms of the Major Subcontract.
- 15.5.2 the Major Subcontract shall only be terminable for cause, unless City exercises a termination for convenience under this Agreement, in which case CMAR Firm may terminate the Major Subcontractor for convenience in accordance with Section 26;
- 15.5.3 the Major Subcontract shall include an indemnity from the Subcontractor in favor of CMAR Firm and the Indemnified Parties against any and all Losses in connection with any breach of this Agreement, negligence, gross negligence, fraud, bad faith, recklessness, criminal conduct, intentional misconduct, breach of Applicable Law or any other negligent or culpable act or omission by any CMAR-Related Entity, failure to comply with Governmental Approvals, violation of any Applicable Law, or breach of contract by the Subcontractor or any of its officers, employees, agents or representatives; provided, however, that such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on the Major Subcontractor for the active negligence of City, or to relieve City of liability for such active negligence; and
- 15.5.4 the Major Subcontract shall include a covenant, expressly stated to survive termination of the Major Subcontract, to promptly execute and deliver to City a new contract between the Subcontractor and City on the same terms and

conditions as the Major Subcontract, in the event: (a) the Major Subcontract is rejected by CMAR Firm in bankruptcy or otherwise wrongfully terminated by CMAR Firm; or (b) City delivers notice for such new contract following termination or expiration of this Agreement.

## **15.6 Other Requirements**

- 15.6.1 Under section 6109 of the Public Contract Code, no Subcontractor shall perform Work if that Subcontractor is ineligible to perform work on public works projects under section 1777.1 or 1777.7 of the Labor Code.
- 15.6.2 CMAR Firm shall comply with all other requirements in this Agreement applicable to Subcontracts, including Exhibit 10D (State Requirements).
- 15.6.3 The percentage of retainage to be withheld under Subcontracts shall not exceed the amount withheld by City under this Agreement.
- 15.6.4 Within 10 days after issuance of NTP 2, CMAR Firm shall complete and provide to City a schedule listing its current Subcontractors for the Construction Phase Work, in the form of Exhibit 10C (Subcontractor Identification Form). CMAR Firm shall provide an updated schedule monthly throughout performance of the Work.
- 15.6.5 Without limiting Section 15.6.6, City may review the standard form of the Subcontract used by CMAR Firm for the Project and require modifications to such form to conform to the requirements in this Agreement.
- 15.6.6 CMAR Firm shall allow City access to all Subcontracts and records regarding Subcontracts. CMAR Firm shall deliver to City, within 10 days after execution, true and complete copies of all Major Subcontracts, and within 10 days after receipt of a request from City, true and complete copies of all other Subcontracts as may be requested. At CMAR Firm's option, copies of the pages of the Subcontracts delivered to City may be redacted to remove pricing information.
- 15.6.7 As a condition precedent to Completion of the Work or any Early Work, CMAR Firm shall procure and provide City with the warranties described in the Project Specific Information from the relevant Subcontractor undertaking or supplying the work or item that is the subject of the warranty.
- 15.6.8 No warranty will be construed in any way to modify or limit any of the rights, powers or remedies of City against CMAR Firm under this Agreement or otherwise under Applicable Laws.
- 15.6.9 If CMAR Firm is unable to or fails for any reason to provide any warranty required under this Agreement:
  - (a) CMAR Firm is deemed to have provided the warranty itself on like terms;
  - (b) City will be entitled to elect to take an assignment of all the right, title and interest in CMAR Firm's rights against the Subcontractor in relation to the Project Assets; and

- (c) for the purpose of Section 15.6.9(b), CMAR Firm irrevocably appoints City as its lawful attorney to execute any instrument necessary to give effect to the assignment.

15.6.10 No assignment of any warranty under Section 15.6.9(b) will be construed in any way to modify or limit any of the rights, powers or remedies of City against CMAR Firm under this Agreement or otherwise under Applicable Laws.

## **16. EQUAL EMPLOYMENT OPPORTUNITIES; LABOR; PREVAILING WAGE**

### **16.1 Equal Employment Opportunity**

- 16.1.1 Without limiting CMAR Firm's obligations under Exhibit 10D (State Requirements), CMAR Firm shall not discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, pregnancy, denial of medical and family care leave or pregnancy disability leave, or military and veteran status for any portion of the Work.
- 16.1.2 CMAR Firm will take affirmative action to ensure that employees are treated during employment or training without regard to their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, pregnancy, denial of medical and family care leave or pregnancy disability leave, or military and veteran status.
- 16.1.3 CMAR Firm shall: (i) require each Subcontractor to comply with the requirements in Section 16.1.1; (ii) include Section 16.1.1 in every Subcontract to which it is a party (including purchase orders and in every subcontract of any CMAR-Related Entity for the Work); and (iii) require that they be included in all subcontracts at lower tiers, so that such provisions will be binding upon each subcontractor. Failure by CMAR Firm to comply with the requirements in Section 16.1.1 shall be a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as City deems appropriate (subject to CMAR Firm's rights to notice and opportunity to cure in this Agreement).
- 16.1.4 CMAR Firm confirms that CMAR Firm has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that CMAR Firm maintains no employee facilities segregated on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. CMAR Firm shall comply with all Applicable Laws relating to equal employment opportunity and nondiscrimination, including those in Exhibit 10 (Federal and State Requirements), and shall require its Subcontractors to comply with such provisions.

## 16.2 Labor Standards

- 16.2.1 In performing the Work, CMAR Firm shall comply, and require all Subcontractors to comply, with all applicable federal and State labor, occupational safety and health laws and orders, including payment of prevailing wages.
- 16.2.2 CMAR Firm shall maintain emergency first aid treatment in compliance with the Federal Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.), and CCR, Title 8, Industrial Relations Division 1, Department of Industrial Relations, Chapter 4. CMAR Firm certifies that it is aware of and has complied with the provisions of California Labor Code section 5401.7, which requires every employer to adopt a written injury and illness prevention program.
- 16.2.3 With each invoice, and in no event later than the 15th day of each month during the term of this Agreement, CMAR Firm shall submit to City certified payroll records for all employees of CMAR Firm and Subcontractors at all tiers for the preceding calendar month, provided that such obligation only applies to employees directly involved in the Work. These records shall be certified, prepared and submitted to City and the California Department of Industrial Relations (DIR), as applicable, in accordance with Applicable Laws, including Labor Code sections 1771.4 and 1776.
- 16.2.4 In the event a prevailing wage law violation is discovered, City will provide notice to CMAR Firm of such violation, and if CMAR Firm fails to resolve that violation with 30 days after such notice is provided, City shall withhold from CMAR Firm an amount equal to the amount of underpayment and any applicable penalties that may be assessed in connection with such violation, until the violation is resolved.
- 16.2.5 All individuals performing the Work shall be appropriately qualified, experienced, competent and skilled in the performance of the portion of the Work assigned and related obligations of CMAR Firm in accordance with this Agreement and Good Industry Practice.
- 16.2.6 CMAR Firm shall at all times enforce strict discipline and good order among all personnel performing the Work, including its employees and Subcontractors.
- 16.2.7 If any individual performing any portion of the Work is unfit or lacks required qualifications, skill, competence, experience, licensing, certification, registration, permit, approval, bond or insurance or is not performing the Work in a proper, safe and skillful manner, then CMAR Firm shall, or shall cause the applicable Subcontractor to, remove such individual and such individual shall not be re-employed for any portion of the Work.
- 16.2.8 If, after notice and reasonable opportunity to cure, CMAR Firm either (i) fails to take action as required by Section 16.2.7; or (ii) fails to ensure that appropriately qualified, skilled, experienced, competent, licensed, certified, registered, permitted and approved personnel are furnished for the proper performance of the Work, then City may suspend the affected portion of the Work by delivering to CMAR Firm notice of such suspension. Such suspension shall in no way relieve CMAR Firm of any obligation contained in this Agreement.

### 16.3 Labor Code Requirements

- 16.3.1 CMAR Firm shall comply and cause its Subcontractors to comply with the provisions of the Labor Code and implementing regulations, including requirements with respect to prevailing wages (including all Davis-Bacon prevailing wage requirements), and employment and training of apprentices, as described in Exhibit 10 (Federal and State Requirements).
- 16.3.2 CMAR Firm shall comply with the applicable provisions of the Labor Code and implementing regulations relating to labor nondiscrimination, and with the applicable federal requirements, including those in Exhibit 10 (Federal and State Requirements).
- 16.3.3 The DIR is responsible for monitoring and enforcing prevailing wage requirements of applicable labor laws so that all contractors working on the Project are in compliance with State (Division 2, Part 7, Chapter 1 of the Labor Code) prevailing wage statutes and regulations. Accordingly, the Project is subject to the requirements of DIR's compliance monitoring and enforcement program in Title 8, Chapter 8, Subchapter 4.5 of the CCR, which include, among other requirements, the obligation to provide payroll records directly to the DIR Labor Commissioner.
- 16.3.4 Exhibit 10D (State Requirements) provides information regarding a number of labor compliance requirements applicable to this Agreement under Labor Code section 1776. The labor compliance requirements do not constitute an exhaustive list, and additional labor compliance requirements may apply to this Agreement under other Applicable Laws.
- 16.3.5 CMAR Firm shall post a notice at the Site containing the following language:

"This public works project is subject to monitoring and investigative activities by the Division of Labor Standards Enforcement (DLSE), Department of Industrial Relations, State of California. This notice is intended to provide information to all workers employed in the execution of the contract for public work and to all contractors and other persons having access to the job site to ensure compliance with and enforcement of prevailing wage laws on public works projects.

The prevailing wage laws require that all workers be paid at least the minimum hourly wage as determined by the Director of Industrial Relations for the specific classification (or type of work) performed by workers on the Project. These rates are listed on a separate job site posting of minimum prevailing rates required to be maintained by the public entity which awarded the public works contract. Complaints concerning nonpayment of the required minimum wage rates to workers on this Project may be filed with the office of the DLSE.

Complaints should be filed in writing immediately upon discovery of any violations of the prevailing wage laws due to the short period of time following the completion of the project that the CMU may take legal action against those responsible.

Complaints should contain details about the violations alleged (for example, wrong rate paid, not all hours paid, overtime rate not paid for hours worked in excess of 8 hours per day or 40 hours per week, etc.) as well as the name of the employer, the public entity which awarded the public works contract, and the location and name of the project.

For general information concerning the prevailing wage laws and how to file a complaint concerning any violation of these prevailing wage laws, you may contact any DLSE office. Complaint forms are also available at the Department of Industrial Relations website found at [www.dir.ca.gov/dlse/PublicWorks.html](http://www.dir.ca.gov/dlse/PublicWorks.html)."

- 16.3.6 Whenever CMAR Firm has knowledge that any actual or potential labor dispute may delay its performance under this Agreement, CMAR Firm shall immediately notify and submit all relevant information to City.

#### **16.4 Prevailing Wages**

- 16.4.1 CMAR Firm shall comply and cause its Subcontractors to comply with all applicable requirements of Division 2, Part 7, Chapter 1 of the Labor Code, including those in Exhibit 10D (State Requirements).
- 16.4.2 If it is found that a CMAR Firm employee or a Subcontractor has been or is being paid a wage rate less than that required to be paid by this Agreement to be paid, City may declare a CMAR Firm Default.

#### **16.5 Disadvantaged Business Enterprises**

CMAR Firm shall make good faith efforts to

- (a) comply with the goals stated in the DBE Participation Plan; and
- (b) provide the City with the standard required report at least once every six months on the implementation of such plan, including on:
  - (i) the matters set out in such plan; and
  - (ii) any other matters as may be required by the City Representative.

**17. PROGRESS; STARTUP, COMMISSIONING AND ACCEPTANCE TESTING; COMPLETION**

**17.1 Progress and Time for Completion**

CMAR Firm shall regularly and diligently progress the Work in accordance with this Agreement so as to achieve each Construction Phase Milestone by the applicable Construction Phase Milestone Deadline.

**17.2 CMAR Firm to Notify of Completion**

CMAR Firm shall give the City Representative written notice(s):

- (a) 120, 90, 60 and 30 days before it anticipates achieving Completion of the Work or any Early Work; and
- (b) when CMAR Firm determines that it has achieved Completion of the Work or any Early Work.

**17.3 City Representative to Inspect Completion**

17.3.1 Within 10 days after City receives notice under Section 17.2(b), the City Representative will inspect the Work or Early Work and:

- (a) if satisfied that Completion has been achieved, issue a “**Notice of Completion**” to City and CMAR Firm that:
  - (i) states the date upon which the City Representative determines Completion was achieved;
  - (ii) contains a list of any minor Defects, which (A) do not prevent the Work or Early Work from being reasonably capable of being used for its intended purpose, and (B) can be corrected without prejudicing the convenient occupation, use, operation and maintenance of the Work or Early Work; and
  - (iii) provides reasonable details of the work remaining to be performed to achieve Acceptance; or
- (b) if not satisfied that Completion has been achieved (including the resolution of any minor Defects), issue a notice so advising CMAR Firm and City.

17.3.2 If the City Representative issues a notice under Section 17.3.1(b), CMAR Firm shall:

- (a) proceed to bring the Work or Early Work, as applicable, to Completion; and
- (b) when it considers it has achieved Completion, give the City Representative written notice to that effect (after which this Section 17.3 will reapply).



#### 17.4 Acceptance Work

During the Post-Completion Period, CMAR Firm shall:

- (a) correct all Defects listed in the Notice of Completion by the date(s) specified by the City Representative;
- (b) perform the Acceptance Work in accordance with the Agreement; and
- (c) do all things reasonably required by City to ensure Acceptance is achieved by the Acceptance Deadline.

#### 17.5 CMAR Firm to Notify of Acceptance

CMAR Firm shall give the City Representative written notice(s):

- (a) 30 days before it anticipates achieving Acceptance; and
- (b) when CMAR Firm determines that it has achieved Acceptance.

#### 17.6 City Representative to Inspect

17.6.1 Within 10 days after City receives notice under Section 17.5(b), the City Representative will inspect the Work and:

- (a) if satisfied that Acceptance has been achieved, issue a **"Notice of Acceptance"** to City and CMAR Firm stating the date upon which the City Representative determines Acceptance was achieved; or
- (b) if not satisfied that Acceptance has been achieved, issue a notice so advising CMAR Firm and City.

17.6.2 If the City Representative issues a notice under Section 17.6.1(b), CMAR Firm shall:

- (a) proceed to bring the Work to Acceptance; and
- (b) when it considers it has achieved Acceptance, give the City Representative written notice to that effect (after which this Section 17.6 will reapply).

#### 17.7 Notice of Completion and Notice of Acceptance

A Notice of Completion or Notice of Acceptance (as applicable) will not:

- (a) constitute approval of the Work or Early Work, nor will it be taken as an admission or evidence that the Work or Early Work has been satisfactorily carried out in accordance with this Agreement;
- (b) constitute an admission or evidence that the Work or Early Work complies with this Agreement;

- (c) otherwise, constitute any approval, admission or evidence by City or the City Representative of CMAR Firm's performance or compliance with this Agreement; or
- (d) prejudice any rights or remedies of City or the City Representative under this Agreement or otherwise under Applicable Laws.

## **17.8 Liquidated Damages for Delay**

17.8.1 CMAR Firm shall pay liquidated damages:

- (a) if Completion of the Work has not occurred by the Completion Deadline; or
- (b) if Completion or other Milestone, including any Early Work, as agreed to by the Parties in the Project Specific Information (Construction Phase), is not achieved by the applicable Milestone Deadline.

17.8.2 Liquidated damages under Section 17.8.1 shall accrue at the applicable rate specified in the Project Specific Information (Construction Phase), for every day after the applicable Milestone Deadline until the first to occur of the following: (a) the relevant Milestone is achieved; (b) this Agreement terminates or expires; or (c) 365 days after the Milestone Deadline has elapsed.

17.8.3 Liquidated damages under Section 17.8.1 shall constitute City's sole right to monetary damages for delay to Completion of the Work and delay to Completion or other Milestone, including any Early Work.

17.8.4 The Parties agree that (a) the liquidated damages are reasonable and represent good faith estimates and evaluations by the Parties as to the actual, potential damages or harm City would incur as a result of such delay, and (b) do not constitute a penalty.

17.8.5 The Parties intend for the liquidated damages described above to constitute "liquidated damages" as such term is used in Government Code section 53069.85 to the extent said statute may apply and to constitute "stipulated damages" to the extent that said statute is not applicable.

## **17.9 Assistance in Transition**

CMAR Firm shall do all things reasonably required by City to ensure the smooth and orderly transfer of responsibility for the Project Assets to City or its nominee at the end of the Construction Phase, including:

- (a) meeting with City and such other persons, as required by City, to discuss the Project and/or coordination with the VWP Program;
- (b) providing sufficient information to City and its nominee to determine the status and condition of the Project Assets; and
- (c) complying with other requirements of the Contract Documents.

## **18. PAYMENTS TO CMAR FIRM**

### **18.1 Payments for Preconstruction Phase Services**

City will pay CMAR Firm monthly payments for Preconstruction Phase Services performed during the prior month as follows:

- (a) the Cost of the Work, based on the value of the Preconstruction Phase Services which has been carried out during that month, as shown in the monthly project status reports; plus
- (b) premiums for bonds and insurance associated with the Construction Phase in accordance with Section 18.3,

provided the sum of the amounts invoiced under this Section 18.2 may not exceed the Preconstruction Phase Services Amount.

### **18.2 Payments for Construction Phase Work**

If City issues NTP 2, City will pay CMAR Firm monthly payments for Construction Phase Work completed during the prior month as follows:

- (a) the Cost of the Work (including amounts charged to the Cost of the Work Contingency), based on the value of the Construction Phase Work which has been carried out during that month, as shown in the monthly project status reports; plus
- (b) the monthly portion of the Construction Phase Fixed General Conditions Cost, prorated based on the percentage of the total Cost of the Work for Construction Phase incurred during that month, as described in Section 18.2(a); plus
- (c) the monthly portion of the CMAR Firm's Fee for the Construction Phase, prorated based on the percentage of the total Cost of the Work for the Construction Phase during that month, as described in Section 18.2(a); plus
- (d) amounts charged to the CMAR Firm's Contingency for Construction Phase during that month; plus
- (e) premiums for bonds and insurance associated with the Construction Phase in accordance with Section 18.3; plus
- (f) the Incentive (if any), in accordance with Section 18.10; plus
- (g) upon Construction Phase Acceptance, any remaining portion of the Construction Phase Fixed General Conditions Cost and CMAR Firm's Fee for the Construction Phase, which has not yet been paid by City,

provided the sum of the amounts invoiced under this Section 18.2 may not exceed the GMP for the Construction Phase Work or any Early Work, and no

payment shall be made in advance of the final payment that would reduce the final invoice amount below the minimum amount specified in Section 18.13.1.

### **18.3 Payment for Bonds and Insurance**

- 18.3.1 City shall reimburse CMAR Firm for bond and insurance premiums actually paid, without markup, and not to exceed the applicable amount in the Project Specific Information.
- 18.3.2 CMAR Firm may invoice such pass-through amounts no earlier than:
  - (a) the first invoice following NTP 1, for the portion of the Preconstruction Phase Services Fee allocated to bond and insurance premiums for Preconstruction Phase Services; and
  - (b) the first invoice following NTP 2, for the portion of the GMP allocated to bond and insurance premiums for Construction Phase Work.
- 18.3.3 CMAR Firm shall not be entitled to be paid for any difference between the not-to-exceed amount in the Project Specific Information and the sum of the amounts payable under Section 18.3.2.

### **18.4 Allowance Items and Allowance Values**

- 18.4.1 CMAR Firm and City shall:
  - (a) collaborate in good faith to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items; and
  - (b) collaborate in good faith during the preparation of the design to develop Construction Documents consistent with the Allowance Values.
- 18.4.2 For each Allowance Item, the City Representative shall give CMAR Firm a written instruction either deleting that Allowance Item from the Agreement or requiring CMAR Firm to proceed with the relevant Allowance Item (prior to CMAR Firm proceeding with such Work).
- 18.4.3 If any Allowance Item is deleted from this Agreement:
  - (a) the Target Cost of the Work and GMP will be reduced by the Allowance Value;
  - (b) the CMAR Firm's Fee for the particular Phase in which such Allowance Item would have been performed will be reduced by a percentage of the CMAR Firm's Fee that is equal to the dividend of the Allowance Value of the deleted Allowance Item divided by the Target Cost of the Work, as shown below:

(c) Reduction in CMAR Firm's Fee = (Allowance Value of Deleted Allowance Item ÷ Target Cost of the Work);

(d) and

(e) City may engage an Other Contractor to carry out the Allowance Item or perform such Allowance Item itself.

18.4.4 All other costs and Construction Phase Fixed General Conditions Cost are deemed to be included in the original Preconstruction Phase Services Fee or GMP (as applicable) and are not subject to adjustment, regardless of the actual costs of the Allowance Item.

18.4.5 If the actual costs for an Allowance Item differs from the stated Allowance Value, the Target Cost of the Work, CMAR Firm's Fee and GMP shall be adjusted accordingly by Change Order; however, CMAR Firm shall provide written notice of the difference between the actual cost and the Allowance Value. The amount of the Change Order shall identify the difference between actual costs incurred by CMAR Firm for the particular Allowance Item and the Allowance Value and reflect a proportional adjustment to the CMAR Firm's Fee.

## 18.5 Contingencies in Subcontracted Work

18.5.1 Without limiting Section 18.4 and subject to Section 18.5.2, CMAR Firm acknowledges and agrees that each Major Subcontractor engaged to perform Work on a lump sum basis:

(a) is deemed to have allowed in its lump sum for all Work that may be required of such Subcontractor, except for any Change due to a Relief Event or Change Order directed by City; and

(b) will not be entitled to any increase in the lump sum or to make any other Claim against City arising in connection with any Change in the scope of that Subcontractor's portion of the Work from that anticipated by the Subcontractor when it proposed its lump sum, except for any additional Work due to a Relief Event or Change Order directed by City,

and CMAR Firm shall ensure that the foregoing terms are reflected in the terms of each relevant Subcontract.

18.5.2 CMAR Firm acknowledges and agrees that nothing in this Section 18.4:

(a) confers any rights or entitlements on CMAR Firm;

(b) relieves CMAR Firm from, or alters or affects, CMAR Firm's liabilities or responsibilities whether under this Agreement or under Applicable Laws; or

(c) prejudices City's rights against CMAR Firm whether under this Agreement or under Applicable Laws.

## 18.6 Calculation of Construction Phase Fixed General Conditions Cost

- 18.6.1 The Construction Phase Fixed General Conditions Cost shall be established in accordance with this Section 18.6 and Exhibit 7 (Cost of the Work).
- 18.6.2 After issuance of NTP 2, and provided City (in its sole discretion) accepts the Construction Phase Fixed General Conditions Costs proposed in the GMP Proposal:
- (a) CMAR Firm shall no longer be reimbursed for any portion of the Cost of the Work included in the Construction Phase Fixed General Conditions Costs and Exhibit 7 (Cost of the Work) shall be amended to reflect such change as part of the Construction Phase Amendment;
  - (b) CMAR Firm's sole compensation for the costs identified in Section 1.1.4 of Exhibit 7 (Cost of the Work) shall be through payment of the Construction Phase Fixed General Conditions Costs; and
  - (c) the Construction Phase Fixed General Conditions Costs shall not be modified for any reason, except where CMAR Firm is entitled to compensation for a City-Caused Delay or Change in Law that qualifies as a Compensable Event pursuant to Section 20.3.
- 18.6.3 Any modification to the Construction Phase Fixed General Conditions Costs permitted under Section 18.6.2(c) shall be calculated as provided in this Section 18.6.3, added to the Construction Phase Fixed General Conditions Costs by Change Order, and subject to the following:
- (a) CMAR Firm shall be entitled to receive a liquidated daily rate for Extended General Conditions Costs for each day that a Construction Phase Milestone Deadline is extended pursuant to Section 20.3 for a City-Caused Delay or Change in Law ("**CMAR Firm's Delay Rate**");
  - (b) the CMAR Firm's Delay Rate shall be calculated by dividing the Construction Phase Fixed General Conditions Costs by the number of days in Construction Phase as provided in the most recent version of the Construction Phase Project Schedule prior to the City-Caused Delay or Change in Law (as applicable); and
  - (c) the CMAR Firm's Delay Rate shall be multiplied by the number of days that a Construction Phase Milestone Deadline is extended pursuant to Section 20.3 which shall constitute the "**Extended General Conditions Costs**."
- 18.6.4 The CMAR Firm's Delay Rate shall not apply for any delay to the Work occurring after the Date of Completion of the Work.
- 18.6.5 The Parties agree that the CMAR Firm's Delay Rate is reasonable and represents good faith estimates and evaluations by the Parties as to the actual, potential damages or harm CMAR Firm would incur as a result of delay to the Work and does not constitute a penalty.

## 18.7 Lump Sum Amounts

- 18.7.1 City and CMAR Firm may negotiate a lump sum amount for specific scopes of the Work ("**Lump Sum SOW**") for incorporation into the Project Specific Information (Construction Phase) or documentation through a Change Order.
- 18.7.2 Any agreement regarding a Lump Sum SOW shall include the following information:
- (a) a description of the Lump Sum SOW;
  - (b) an updated schedule of values that incorporates the lump sum amount; and
  - (c) any milestone dates or deadlines associated with the Lump Sum SOW.
- 18.7.3 For each Lump Sum SOW, CMAR Firm shall be compensated pursuant to the schedule of values based on the percentage of the Lump Sum SOW that has been completed.
- 18.7.4 CMAR Firm shall not request reimbursement for costs subject to the lump sum amount, unless those costs are identified in an invoice as being subject to the lump sum amount.
- 18.7.5 The agreed lump sum amount for a Lump Sum SOW may only be modified via a Change Order.

## 18.8 Contingencies

- 18.8.1 Any GMP agreed by the Parties in accordance with this Agreement, shall include the following Contingencies which are available for CMAR Firm's exclusive use for the following unanticipated costs it has incurred that are not the basis for a Change Order under this Agreement.
- (a) The "**Cost of the Work Contingency**" is reimbursed as a Cost of the Work and shall include appropriate contingency for all risks allocated to CMAR Firm under this Agreement. The Cost of the Work Contingency is available to CMAR Firm for any items that constitute Cost of the Work, including:
    - (i) trade buy-out differentials;
    - (ii) escalation of materials costs; and
    - (iii) repairing, replacing or rebuilding the Project Assets in connection with a Force Majeure Event under Section 20.4.
  - (b) The "**CMAR Firm's Contingency**" is available to CMAR Firm for the following items:
    - (i) overtime or acceleration;

- (ii) costs incurred by CMAR Firm in repairing or correcting Defects (excluding any warranty or corrective Work performed after Acceptance), provided that such Defect was beyond the reasonable control of CMAR Firm, or caused by the ordinary mistakes or inadvertence, and not the negligence, of CMAR Firm or those working by or through CMAR Firm; and
  - (iii) subject to Section 18.8(a)(ii)(ii), Subcontractor or other tier defaults (including incorrect or incomplete Work) to the extent not compensated by any surety or bond and provided that such Work was beyond the reasonable control of CMAR Firm, or caused by the ordinary mistakes or inadvertence, and not the negligence, of CMAR Firm.
- (c) City may, in its sole discretion, approve other costs that may be reimbursed under a Contingency.

**18.8.2 CMAR Firm shall be reimbursed for Contingencies in the same manner as the Cost of the Work provided that:**

- (a) CMAR Firm's compensation for the Cost of the Work Contingency or the CMAR Firm's Contingency shall not cumulatively exceed the applicable amount in the Project Specific Information without a written Change Order;
- (b) CMAR Firm shall not be entitled to any increase in the CMAR Firm's Fee for items reimbursed as part of the CMAR Firm's Contingency or the Cost of the Work Contingency; and
- (c) CMAR Firm shall not be entitled to use the Contingencies for payment of liquidated damages under this Agreement.

18.8.3 Prior to the final accounting, no Contingencies are available to City for any reason, including changes in scope or any other item which would enable CMAR Firm to increase the GMP under this Agreement.

18.8.4 CMAR Firm shall provide City notice of all anticipated charges against the Contingencies and shall provide City as part of the monthly report an accounting of the Contingencies, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three months.

18.8.5 CMAR Firm agrees that:

- (a) with respect to any expenditure from the Contingencies relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, CMAR Firm will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company;



- (b) if CMAR Firm is subsequently reimbursed for any such expenditure from the Contingencies, then such amounts will be credited back to the applicable Contingency;
  - (c) CMAR Firm may only utilize a Contingency to cover such costs if both (A) the Contingency has not already been expended, and (B) the cost occurs prior to Acceptance; and
  - (d) CMAR Firm may not use a Contingency for items or costs that arise as a result of CMAR Firm's negligence or that are covered by the CMAR Firm's Fee or Construction Phase Fixed General Conditions Cost.
- 18.8.6 At the conclusion of the Project, any savings from the Contingencies shall be allocated as follows:
  - (a) any savings from the Cost of the Work Contingency shall remain with City;
  - (b) any savings from the CMAR Firm's Contingency for Preconstruction Phase shall remain with City; and
  - (c) any savings from the CMAR Firm's Contingency for Construction Phase shall be allocated between the Parties in accordance with Section 18.10.

## **18.9 Unit Prices**

- 18.9.1 The Tables of Rates and Prices includes unit prices agreed on by the Parties.
- 18.9.2 CMAR Firm shall provide to City an accounting of all such unit prices incurred during the Work. Such accounting shall include identification of the unit price and the number of units actually incurred.
- 18.9.3 CMAR Firm shall only be compensated for those unit prices that are identified in the agreed-upon Tables of Rates and Prices and that are actually incurred and submitted for reimbursement in an invoice.
- 18.9.4 CMAR Firm shall be compensated for all unit prices within the GMP.

## **18.10 Incentive for Construction Phase Work**

- 18.10.1 If CMAR Firm does not exhaust the CMAR Firm's Contingency allocated to the Construction Phase Work, the remaining amount of the CMAR Firm's Contingency ("**Savings**") shall be shared between the Parties as follows:
  - (a) 50% of the Savings to remain with City; and
  - (b) 50% of the Savings to be paid to CMAR Firm.
- 18.10.2 The Savings shall be calculated and paid as part of final payment for the Construction Phase Work under Section 18.13, with the understanding that to the extent CMAR Firm incurs costs after the Acceptance Date which would have been payable to CMAR Firm as a Cost of the Work, the Parties shall recalculate

the Savings in light of the costs so incurred, and compensation payable to CMAR Firm shall be adjusted accordingly.

18.10.3 As conditions precedent to CMAR Firm's entitlement to any Savings under this Section 18.10:

- (a) CMAR Firm must have achieved Completion of the Work on or before the Completion Deadline; and
- (b) CMAR Firm must have agreed to release City from all Claims in connection with all Work performed during Preconstruction Phase and Construction Phase in accordance with Section 18.13.1(d).

## 18.11 Invoices

18.11.1 CMAR Firm shall submit to the City Representative an invoice on account of all amounts then payable by City to CMAR Firm under this Agreement:

- (a) monthly, at the times specified in the Project Specific Information (Preconstruction Phase) (unless some other period is agreed to by the Parties in writing);
- (b) in a format approved by the City Representative;
- (c) which is based on the applicable Table of Rates and Prices to the extent this is relevant;
- (d) which, during the Preconstruction Phase, shows separately the amounts (if any) claimed on account of:
  - (i) the Cost of the Work payable to:
    - A. Subcontractor(s); and
    - B. CMAR Firm;
  - (ii) premiums for bonds and insurance;
  - (iii) all other amounts then payable by City to CMAR Firm under this Agreement;
- (e) which, during the Construction Phase, shows separately the amounts (if any) claimed on account of:
  - (i) the Cost of the Work payable to:
    - A. Subcontractor(s); and
    - B. CMAR Firm;
  - (ii) the CMAR Firm's Fee;

- (iii) the Construction Phase Fixed General Conditions Cost;
  - (iv) the CMAR Firm's Contingency;
  - (v) any Lump Sum SOW;
  - (vi) premiums for bonds and insurance;
  - (vii) the Incentive; and
  - (viii) all other amounts then payable by City to CMAR Firm under this Agreement;
- (f) which provides a current, up-to-date Construction Phase Project Schedule and PSR and summary of AIS materials installed during that period; and
- (g) which sets out or attaches sufficient details, calculations, supporting documentation and other information with respect to all amounts claimed by CMAR Firm:
- (i) to enable the City Representative to fully and accurately determine (without needing to refer to any other documentation or information) the amounts then payable by City to CMAR Firm under this Agreement; and
  - (ii) including any such documentation or information, which the City Representative may by written notice from time to time require CMAR Firm to set out or attach, whether in relation to a specific invoice or all invoices generally.

## 18.12 Payment by City

18.12.1 Within 30 days after City's receipt of a complete invoice that satisfies all the requirements in Section 18.11, City shall approve or dispute all or a portion of such invoice. City shall provide CMAR Firm the reason(s) for any disputed portions of such invoice, withhold the disputed amount and Section 18.19 shall apply. City shall pay CMAR Firm the undisputed amount of such invoice approved for payment less any applicable Retainage and less any amounts that City is otherwise entitled to withhold or deduct under this Agreement.

18.12.2 No payment by City is or shall be construed as: (a) evidence of the value of Work, (b) evidence that the Work has been satisfactorily carried out in accordance with this Agreement, (c) an admission of liability by City, (d) an approval by City of CMAR Firm performance or compliance with this Agreement, (e) an acknowledgement that City has inspected or accepted the Work, or (f) a waiver of any Claim or right that City may then or thereafter have, including among others, warranty and indemnity rights.

18.12.3 All payments made by City shall be subject to correction or adjustment in subsequent progress reviews and payments.

### 18.13 Final Invoice and Notice for Construction Phase Work

18.13.1 Final payment for the Construction Phase Work shall not become due to CMAR Firm under this Agreement until (1) all conditions to Acceptance required under this Agreement have been satisfied and (2) CMAR Firm submits to City an invoice for final payment showing the proposed total amount due to CMAR Firm, which invoice shall be in the minimum amount specified in the Project Specific Information (Construction Phase), that City determines, in its sole discretion, constitutes appropriate compensation for final Work and deliverables required for Acceptance. The invoice shall meet all requirements for invoices under Section 18.11 and must be accompanied by:

- (a) a list of all outstanding or pending CMAR Firm requests for Change Order and all existing or threatened claims, Liens and stop payment notices by Subcontractors, Utility Owners, or other third parties relating to the Project, stating the amount at issue associated with each such notice;
- (b) complete and legally effective releases or waivers of Liens and stop payment notices, in the applicable forms required under Civil Code sections 8132 through 8138, from all Persons legally eligible to file Liens and stop payment notices in connection with the Work; except that, as applicable, CMAR Firm may provide release bonds, or other security acceptable to City, in amounts equal to 125% of amounts claimed in any stop payment notices filed in connection with the Project;
- (c) consent of any Guarantors and Sureties to the final payment for Construction Phase Work;
- (d) an executed release from CMAR Firm for any Claims that arise in connection with the Work that survive the final payment, including an express and unconditional waiver and release sufficient to waive any rights and benefits CMAR Firm may have under section 1542 of the Civil Code, which shall release and waive any Claims against the Indemnified Parties; such release shall be accompanied by an affidavit from CMAR Firm certifying that:
  - (i) all Preconstruction Phase Services and Construction Phase Work has been performed and completed in accordance with this Agreement;
  - (ii) it has resolved any Claims made by Subcontractors, Utility Owners, and others against CMAR Firm or the Project;
  - (iii) it has no reason to believe that any Person has a valid Claim against CMAR Firm or the Project except for Claims that CMAR Firm has notified City of in writing prior to the date of the invoice for final payment or concurrently with delivery of such invoice; and
  - (iv) all guarantees and warranties required hereunder, including Subcontractor warranties, are in full force and effect;

- (e) bills of sale or other instruments of title transfer or assignment with respect to Intellectual Property (subject to Section 22.4), as requested by City, free and clear of liens, claims and encumbrances;
- (f) affidavits of prevailing wages paid, signed and submitted by CMAR Firm and each Subcontractor required to submit such an affidavit under Labor Code section 1775(b)(4) in the form required under Applicable Laws;
- (g) assignment to City of all right, title and interest in and to all claims and causes of action it might have under section 4 of the Clayton Act (15 U.S.C. § 15) or under the Cartwright Act (Chapter 2 (commencing with section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, equipment, hardware, software or materials in accordance with this Agreement or any Subcontract;
- (h) an accounting of any Savings and the allocation of that Savings and the Incentive under Section 18.10;
- (i) an accounting of any remaining portion of the Construction Phase Fixed General Conditions Cost and CMAR Firm's Fee for Construction Phase, which has not yet been paid by City; and
- (j) such other supporting documentation to enable City to fully and accurately determine (without needing to refer to any other documentation or information) the amounts payable by City to CMAR Firm, including any information reasonably requested by City.

#### **18.14 Interest**

- 18.14.1 Any amounts that CMAR Firm owes to City under this Agreement shall earn interest from the date such amounts are due to City at the lesser rate of (a) 10% per annum, and (b) the maximum rate allowable under Applicable Laws.
- 18.14.2 If payment of any undisputed amount from City to CMAR Firm is made after the 30th day following the proper submission of an undisputed and properly completed invoice in accordance with Section 18.11 or 18.13 (as applicable), then the payment shall include interest on the amount owing, at the rate in Code of Civil Procedure section 685.010(a), from the 30th day after the payment was due until the date of payment.
- 18.14.3 Interest shall not accrue on Retainage or monies withheld pursuant to stop notices or the final payment under this Agreement.

#### **18.15 Correction of Payment Statements**

In any payment statement given by the City Representative, the City Representative may:

- (a) correct any error in any previous payment statement; and
- (b) modify any previous payment statement.

## 18.16 Deductions, Exclusions and Limitations on Payment

### 18.16.1 Retainage

- (a) During the Construction Phase until the Date of Completion of the Work, City shall withhold funds (“**Retainage**”) from each payment to be made to CMAR Firm under this Agreement in an amount equal to 5% of the payment amount for the Construction Phase Work.
- (b) Except as otherwise provided in Section 18.16.1(d), the earliest dates for release of Retainage are as follows: (A) 50% of the Retainage 30 days after the Date of Completion of the Work; and (B) 100% of the Retainage 60 days after completion of the Work (as “completion” is defined in Public Contract Code section 7107).
- (c) Except as otherwise provided in Section 18.16.1(d), no portion of any Retainage shall be released until the following conditions have been met:
  - (i) all liquidated damages have been paid to City in accordance with this Agreement;
  - (ii) CMAR Firm has established to City’s satisfaction that liquidated damages are not anticipated to be owing to City;
  - (iii) CMAR Firm has provided notice requesting release of Retainage;
  - (iv) no CMAR Firm Default has occurred or remains uncured, and no event has occurred that, with the passage of time or the giving of notice, would constitute an CMAR Firm Default; and
  - (v) release of the applicable Retainage has been approved in writing by each Surety.
- (d) City shall release Retainage withheld for any Work completed by any Subcontractor once per fiscal quarter upon receipt of a quarterly application from CMAR Firm (i) stating the Subcontractor has satisfactorily completed all Work required to be performed under its Subcontract, (ii) stating the amount withheld by CMAR Firm under the Subcontract, and (iii) providing all backup information and stop payment notice and Lien releases as may be required by City.
- (e) Within seven days after receipt of payment of Retainage from City to CMAR Firm for completed subcontracted Work, CMAR Firm shall pay to the applicable Subcontractor (i.e., the Subcontractor that completed the subcontracted Work) all moneys withheld as retention from the Subcontractor, even if Work to be performed by CMAR Firm or other Subcontractors is not completed and has not been accepted. CMAR Firm shall show good cause and obtain City’s prior written consent for any delay or postponement in payment of retainage over 30 days.

- (f) The amounts to be released under Section 18.16.1(b) shall be reduced by 150% of the sum of the following: (i) any amounts which City is required to retain under Public Contract Code section 9203; (ii) any amounts applied to the payment of Losses incurred by City for which CMAR Firm is responsible; (iii) any amounts that City deems advisable, in its good faith discretion, to retain to cover any existing or threatened claims, Liens and stop payment notices from Subcontractors, suppliers, laborers, Utility Owners, or other third parties relating to the Project; (iv) the estimated cost, as determined by City, in its good faith discretion, of remedying any Defects or otherwise remedying any breach of contract or CMAR Firm Default by CMAR Firm; (v) any amounts City is required to retain under applicable federal law, including 26 U.S.C. § 3402; and (vi) any liquidated damages.
- (g) Final payment of Retainage not applied as a result of Section 18.16.1(f) shall be made upon CMAR Firm's showing, to City's satisfaction, that all such matters have been resolved, and CMAR Firm shall deliver to City a certificate representing that there are no outstanding Claims of CMAR Firm or any Claims, Liens or stop payment notices of any Subcontractor, supplier, laborer, Utility Owner or other third party with respect to the Work.
- (h) CMAR Firm may substitute securities or a letter of credit for the Retainage pursuant to the procedures contained in Public Contract Code section 22300. No such substitution shall be accepted until: (i) City approves such securities or letter of credit as qualifying substitutes; (ii) the value of such securities has been established to City's satisfaction; (iii) the Parties have entered into an escrow agreement (if the securities are to be held in escrow) in form substantially similar to that contained in Public Contract Code section 22300; and (iv) all documentation necessary for assignment of the securities to City or to the escrow agent, as appropriate, has been delivered in form and substance satisfactory to City. If CMAR Firm has substituted securities for any of the Retainage, then City may request that such securities be revalued from time to time, but not more often than monthly. Such revaluation would be made by the Person designated by City and approved by CMAR Firm. If such revaluation results in a determination that such securities have a market value less than the amount of Retainage for which they were substituted, then, notwithstanding anything to the contrary contained in this Agreement, the amount of the Retainage required under this Agreement shall be increased by such difference in market value. Such increased Retainage shall be withheld from the next payment due to CMAR Firm under this Agreement.

#### **18.16.2 Withholding of Payment**

- (a) Notwithstanding any other provision of this Agreement and in addition to the deductions provided for under Sections 9.5.5 and 18.16.1, City may deduct from any payment owing under this Agreement:

- (i) any debt, charge, payment, reimbursement or other moneys due from CMAR Firm to City, whether under this Agreement or under Applicable Laws, including liquidated damages that have accrued as of the date of any invoice or that are anticipated to accrue based on the Milestone Deadlines shown in the Project Schedule;
  - (ii) any Claim that City or others as specified below may have against CMAR Firm including:
    - A. failure of CMAR Firm to make payments of undisputed amounts to a Subcontractor when such payments are due under the Subcontract, which failure is not cured by CMAR Firm; and
    - B. Claims by any third party for which CMAR Firm is responsible;
  - (iii) if a notice to stop payment is filed with City, due to CMAR Firm's failure to pay for labor or materials used in the Work, money due for such labor or materials, plus the 25% prescribed by law, will be withheld from payment to CMAR Firm; provided that in accordance with Civil Code section 9364, City may accept a bond by a corporate surety in lieu of withholding payment;
  - (iv) any sums expended by or owing to City as a result of CMAR Firm's failure to maintain any as-built documents;
  - (v) any sums expended by City in performing any of CMAR Firm's obligations under this Agreement that CMAR Firm has failed to perform or that City may elect to undertake itself (including Acceptance Work) plus an administrative charge equal to 10% of such costs;
  - (vi) any sums for a Change Order that decreases, omits, deletes or removes Work as provided in the applicable Change Order;
  - (vii) any sums for Defects that are not timely remedied by CMAR Firm under the terms of this Agreement;
  - (viii) any sums for liquidated damages assessed under Sections 7.5, 12.5 and/or 17.8; and
  - (ix) all legally required sums for, but not limited to, stop notices, labor and tax Liens, including any fines or penalties City incurs because of the failure or alleged failure by any CMAR-Related Entity to comply with the Governmental Approvals or Applicable Laws (including any Environmental Laws).
- (b) The failure by City to deduct any of these sums from any payment shall not constitute a waiver of City's rights to such sums or of its rights with respect to any breach or default related thereto. When the reasons for



deducting, offsetting or withholding payment are removed, City shall pay CMAR Firm for amounts previously deducted as part of the next monthly payment.

#### **18.17 Payment to Subcontractors**

18.17.1 Upon receipt of payment from City, CMAR Firm shall pay each Subcontractor within seven days of receipt of payment from City, out of the amount paid to CMAR Firm on account of such Subcontractor's portion of the Work, the amount to which such Subcontractor is entitled, less any retainage provided for in the Subcontract; provided any such retainage may not exceed the amount of Retainage withheld under this Agreement.

18.17.2 Any breach of the prompt payment requirements in this Section 18.17 shall subject CMAR Firm to the penalties, sanctions and other remedies specified in Business and Professions Code section 7108.5, and may result in the application of appropriate administrative sanctions, including City's right to withhold two percent of the invoice amount due to CMAR Firm as a penalty for every month that full payment is not made to a Subcontractor. This requirement shall not be construed to limit or impair any contractual, administrative, judicial or equitable remedies otherwise available to CMAR Firm or any Subcontractor against each other in the event of a dispute involving late payment or nonpayment by CMAR Firm or deficient Subcontract performance or noncompliance by a Subcontractor.

18.17.3 City has no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by Applicable Laws. Within five days after submission of any notice of claim that is based in whole or in part on a request by a Subcontractor for a price increase or time extension under its Subcontract, CMAR Firm shall review and analyze the claim, determine in good faith and certify that it is justified under the Subcontract and that CMAR Firm is justified in making its request for an increase in compensation and/or time extension. Each such notice involving Subcontractor work shall include a summary of CMAR Firm's analysis of the claim. Any such notice under this Section 18.17 shall be considered incomplete if it involves Subcontractor work and is not accompanied by such analysis and certification.

#### **18.18 Payment of "Claims" Under Public Contract Code Section 9204**

The Parties acknowledge that Public Contract Code section 9204 requires City to make payments to CMAR Firm with respect to any portion of a "claim" as that term is defined in Public Contract Code section 9204, which City identifies as undisputed. If any such payments are made, future invoices shall account for such payments in a manner acceptable to City. A copy of Public Contract Code section 9204 is attached as Exhibit 10E (Public Contract Code Section 9204).

#### **18.19 Disputes**

Failure by City to pay any amount in dispute shall not alleviate, diminish or modify in any respect CMAR Firm's obligation to perform the Work in accordance with this Agreement, and CMAR Firm shall not cease or slow down its performance under this Agreement on account of any such amount in dispute. Any Dispute regarding payment shall be resolved

in accordance with Section 28. CMAR Firm shall proceed as directed by City pending resolution of the Dispute. Upon resolution of any such Dispute, each Party shall promptly pay to the other any amount owing.

## **19. GENERAL PROVISIONS APPLYING TO RELIEF EVENTS**

### **19.1 Sole Entitlement**

To the fullest extent permitted by Applicable Laws, CMAR Firm acknowledges and agrees that:

- (a) the amounts payable under Section 18 constitute full compensation for performance of the Work; and
- (b) CMAR Firm's sole right to claim an extension of time, additional compensation, relief from performance of its obligations, or other relief under this Agreement or to otherwise make any Claim in connection with any Relief Event are as set out in Sections 19 through 21.

### **19.2 Mitigation**

CMAR Firm shall take all proper and reasonable steps necessary and within its control both to preclude, and to minimize the occurrence or and consequences of a Relief Event.

### **19.3 Deductions for Relief Events**

19.3.1 The compensation payable or relief due to CMAR Firm with respect to any Relief Event will be reduced:

- (a) by any amount which a CMAR-Related Entity recovers under any insurance policy in connection with the Relief Event, or would have recovered if it had complied with the requirements of this Agreement, which amount will not include any excess or deductibles or any amount over the maximum amount insured under any such insurance policy; and
- (b) by the amount of any costs avoided or otherwise reduced as a result of the Relief Event.

19.3.2 No compensation will be allowed for any Relief Event to the extent that, the Relief Event arises out of, relates to or was caused or contributed to by:

- (a) any CMAR Firm Fault; or
- (b) to the extent CMAR Firm fails to take all proper and commercially reasonable steps necessary and within its control both to preclude, and to minimize the occurrence and consequences of the Relief Event.

## 20. RELIEF EVENTS

### 20.1 Notice

- 20.1.1 Any notice or information CMAR Firm is required to provide to City with respect to a Relief Event is a **“Relief Event Notice.”**
- 20.1.2 Without limiting CMAR Firm’s obligations under Section 9.6, CMAR Firm shall give notice to City as soon as possible but no later than 20 days after CMAR Firm has Actual Knowledge of or should have known, in performing its obligations in accordance with Good Industry Practice of any of the following:
- (a) a Relief Event that occurs after the Effective Date but before NTP 2 which may materially adversely impact performance of the Preconstruction Phase Services; or
  - (b) a Relief Event that occurs after the Effective Date but before the Completion Deadline for the Work or any Early Work which may delay the achievement of Completion by the Completion Deadline or may otherwise materially adversely impact performance of the Work.
- 20.1.3 Such notice shall include:
- (a) a summary of the provisions of this Agreement that entitle CMAR Firm to relief;
  - (b) sufficient details of the Relief Event to enable the City Representative to make an informed decision on whether to grant relief, the circumstances from which the Relief Event arises including its nature, the date of its occurrence, its duration, the portions of the Project affected;
  - (c) details of the contemporary records which CMAR Firm shall maintain to substantiate its claim for relief;
  - (d) in the case of a Relief Event materially impacting the Work or any Early Work, analysis of consequences (whether direct or indirect, financial or non-financial) the Relief Event may have upon timely achievement of Completion by the Completion Deadline or any Milestone by the applicable Milestone Deadline, including an impacted delay analysis indicating all activities represented or affected by the change, with activity numbers, durations, predecessor and successor activities, resources and cost, and with a narrative report, in form satisfactory to City, which compares the proposed new schedule to the original Construction Phase Project Schedule, as appropriate; provided that CMAR Firm shall reschedule activities not otherwise affected by the event, in order to take advantage of additional scheduling float available as the result of the time extension;
  - (e) where the Relief Event is also a Compensable Event, an itemized estimate of all amounts claimed under Section 20.3; and

- (f) details and amounts of applicable deductions under Section 19.3 and measures which CMAR Firm has taken to date and proposes to adopt to mitigate and minimize the consequences of the Relief Event.

20.1.4 CMAR Firm shall submit to City supplemental information to substantiate or support CMAR Firm's claim within seven days of receipt of any such request from City.

20.1.5 Upon receipt of all details and information described above, the City Representative may request further supporting particulars or carry out an inspection to investigate and assess the validity of CMAR Firm's claim, including, on-site inspection. CMAR Firm shall promptly comply with any such request from the City Representative.

## **20.2 Delay in Notification**

20.2.1 If CMAR Firm fails to submit any Relief Event Notice within the timeframe expressly stated within this Agreement with respect to the Relief Event, then CMAR Firm shall not be entitled to make any Claim for any Losses in connection with that Relief Event, unless CMAR Firm proves to City, based on clear and convincing evidence, that: (a) City was not materially prejudiced by the lack of the Relief Event Notice; or (b) the City Representative had Actual Knowledge of the Relief Event prior to the due date for the Relief Event Notice.

20.2.2 Notwithstanding anything to the contrary in Section 20.2.1, if CMAR Firm fails to submit any Relief Event Notice within 15 days after the timeframe expressly stated in the Agreement, then CMAR Firm shall not be entitled to make any Claim for any Losses in connection with the Relief Event.

## **20.3 Relief Events Impacting the Work prior to Acceptance**

20.3.1 If:

- (a) a Relief Event occurs after the Effective Date and prior to the Completion Deadline for the Work or any Early Work that will:
  - (i) delay the achievement of Completion by the Completion Deadline; or
  - (ii) materially adversely impact performance of the Preconstruction Phase Services or Construction Phase Work; and
- (b) CMAR Firm has complied with Sections 19 and 20 and the requirements of Div 01 32 21,

then City, in its reasonable discretion, shall provide CMAR Firm with either:

- (i) an adjustment to the Completion Deadline (based on critical path method analysis) to the extent of the delay caused by the Relief Event; or

- (ii) an authorization to accelerate the performance of the Work, without an adjustment to the Completion Deadline; provided:
  - A. CMAR Firm agrees that such acceleration is commercially reasonable; and
  - B. Section 20.3.2(b) shall apply to the extra Cost of the Work as a result of such acceleration.

20.3.2 Subject to Section 19.3, if a Relief Event that qualifies under Section 20.3.1 is also a Compensable Event, then CMAR Firm shall be entitled to have the Preconstruction Phase Services Fee or GMP (as applicable) increased by:

- (a) before or during the Preconstruction Phase, the extra Cost of the Work determined in accordance with Section 18.1 directly attributable to the Compensable Event, and in the case of a City-Caused Delay or Change in Law only, other extra costs reasonably incurred by CMAR Firm as a result of the delay or disruption caused by the City-Caused Delay; and
- (b) during the Construction Phase, (i) the extra Cost of the Work incurred by CMAR Firm directly attributable to the Compensable Event, and in the case of a City-Caused Delay or Change in Law only, Extended General Conditions Costs, plus (ii) a City-Approved adjustment to the CMAR Firm's Fee that shall not exceed the Maximum Percentage times the extra Cost of the Work as a result of the Compensable Event,

as determined by the City Representative under Section 21.3.

## **20.4 Relief Due to Force Majeure Event During the Term**

20.4.1 Notwithstanding anything to the contrary in this Section 20, if:

- (a) any part of the Project Assets is wholly or substantially destroyed or damaged by a Force Majeure Event which is not insured against and is not required to be insured against in accordance with this Agreement; and
- (b) City requires CMAR Firm to repair, replace or rebuild those Project Assets, then

the Parties will use reasonable efforts to negotiate and agree on how those Project Assets will be repaired, replaced or rebuilt; provided the Parties' attempts to negotiate shall not limit any of City's other rights or remedies under this Agreement. Any such agreement will be documented by way of a Change Order.

20.4.2 CMAR Firm may include the cost of performing any minor repair, replacement or rebuilding work associated with a Force Majeure Event in the Cost of the Work Contingency, subject to the limitations provided in Section 18.8.5; provided that if there are insufficient funds to cover such work in the Cost of the Work Contingency, the uncovered portion of such work shall require a Change Order as described in Section 20.4.1.

## 20.5 Extension of Time for Work by Major Subcontractors

CMAR Firm may not approve an extension of time or unilaterally grant an extension of time to any Major Subcontractor unless:

- (a) the Subcontractor is entitled to such extension of time under the terms of its Subcontract as approved by City;
- (b) CMAR Firm has given notice of the proposed extension of time to the City Representative (including details of the Subcontractor's entitlement to such an extension of time under the terms of its Subcontract); and
- (c) the City Representative has given written approval to the extension of time.

## 21. CHANGE ORDERS

### 21.1 Change Order Price Request

21.1.1 At any time during the term of this Agreement, the City Representative may issue a document titled "**Change Order Price Request**" to CMAR Firm, which will set out details of a proposed acceleration, addition, decrease, omission, deletion, removal or modification from or to the Work ("**Change**") which City is considering.

21.1.2 CMAR Firm shall immediately take all action required under any relevant Subcontract in relation to each Subcontractor that would be involved in carrying out the proposed Change.

21.1.3 Within 30 days of the receipt of a Change Order Price Request, CMAR Firm shall provide the City Representative with a written notice in which CMAR Firm sets out:

- (a) the adjustment (if any) to the Target Cost of the Work and CMAR Firm's Fee to carry out the proposed Change;
- (b) the effect (if any) that the carrying out of the proposed Change will have on:
  - (i) the Preconstruction Phase Services Fee, Target Cost of the Work and GMP;
  - (ii) if Section 21.3(a)(ii) applies, the Construction Phase Fixed General Conditions Cost; and
  - (iii) the Project Schedule, including the achievement of each Milestone by the applicable Milestone Deadline.

### 21.2 City Change Order or Directive Letter

21.2.1 Whether or not the City Representative has issued a Change Order Price Request under Section 21.1, the City Representative may at any time during the term of this Agreement unilaterally direct CMAR Firm to carry out a Change by

issuing a written document titled “Change Order” in which the City Representative will state one of the following:

- (a) the proposed adjustments to the amounts payable under this Agreement as set out in CMAR Firm’s notice under Section 21.1 are agreed and will be made; or
- (b) any adjustment to the amounts payable under this Agreement will be determined under Section 21.3.

21.2.2 City may, at any time and for any reason, issue a Directive Letter to CMAR Firm in the event of any desired Change or in the event of any Dispute regarding the scope of Work. The Directive Letter will state that it is issued under this Section 21.2.2, will describe the Work in question and will state the basis for determining compensation, if any.

21.2.3 CMAR Firm shall immediately proceed as directed by any Directive Letter issued by City, but may advise City that it considers the directed Work to constitute a Change and request that City issue a Change Order under Section 21.2.1.

### **21.3 Valuation of Change Order**

- (a) Subject to Sections 13.4 and 21.8, the amounts payable under this Agreement will be adjusted as follows:
  - (i) where the Change Order requires a Change, the adjustments to the Target Cost of the Work, CMAR Firm’s Fee and the Preconstruction Phase Services Fee or GMP (as applicable) will be valued as follows:
    - A. as agreed under Section 21.2.1(a);
    - B. if the foregoing subsection (A) does not apply, based on a Table of Rates and Prices, plus a City-approved adjustment to the CMAR Firm’s Fee, provided that the City Representative determines that such rates or prices are applicable to the Change; or
    - C. if neither subsection (A) nor subsection (B) apply, the amount of the cost that CMAR Firm properly and actually incurred or saved, or which it should have reasonably incurred or saved, as determined by the City Representative, plus a City-approved adjustment to the CMAR Firm’s Fee; and
  - (ii) the proposed Construction Phase Fixed General Conditions Cost in the GMP Proposal will only be adjusted in accordance with Section 18.6.

- (b) No adjustment to the CMAR Firm's Fee shall exceed an amount equal to the applicable Maximum Percentage for the relevant Phase multiplied by the additional Cost of the Work incurred as a direct result of the Change.

#### **21.4 Change Orders Generally**

- 21.4.1 The adjustments agreed or determined under Section 21.3 with respect to any Change will be deemed to be in full satisfaction of all Claims with respect to such further work required for the Change, notwithstanding that the amounts actually payable by CMAR Firm to relevant Subcontractors with respect to such work may be more or less than the adjustment.
- 21.4.2 No Change Order will invalidate this Agreement, irrespective of the nature, extent or value of the work that is the subject of the Change.
- 21.4.3 CMAR Firm shall comply with any Change Order issued by City.

#### **21.5 Omissions**

If a Change Order or any direction by the City Representative omits any part of the Work or any Early Work, City may thereafter carry out the omitted work either itself or by engaging Other Contractors.

#### **21.6 CMAR Firm Change Order Request**

- 21.6.1 CMAR Firm may, for its convenience, request the City Representative to issue a Change Order by submittal of a value engineering change proposal (VECP) in accordance with Div 01 24 13.
- 21.6.2 Any cost savings realized by CMAR Firm from a VECP shall be shared equally between the Parties through a reduction in the GMP as provided in Div 01 24 13.
- 21.6.3 Any cost savings realized by City from a CMAR Firm requested Change Order shall remain with City.

#### **21.7 City Representative's Determination**

- 21.7.1 After a request is made by CMAR Firm in accordance with Section 21.6, the City Representative will, in the City Representative's sole discretion, give a written notice to CMAR Firm:
  - (a) rejecting the request; or
  - (b) approving the request either conditionally or unconditionally.
- 21.7.2 The City Representative will not be obliged to exercise its discretion for CMAR Firm's benefit.



## **21.8 CMAR Firm Change Order Request Approved by the City Representative**

If the City Representative issues a written notice under Section 21.7 approving CMAR Firm's request under Section 21.6:

- (a) amounts payable under this Agreement (or the methods of determining them) will be reduced by or adjusted to reflect the Parties sharing equally in savings under Section 21.6.2; and
- (b) CMAR Firm will be responsible for all parts of the Work which are in any way affected by the Change Order.

## **22. DOCUMENTS AND RECORDS**

### **22.1 Maintenance and Access**

22.1.1 CMAR Firm shall maintain at its Project administration office within Ventura County a complete, accurate and up to date set of all Books and Records, including copies of all original documents delivered to City. CMAR Firm shall notify City where such records and documents are kept.

22.1.2 CMAR Firm shall keep and maintain all Books and Records required under Section 22.1.1 in accordance with applicable provisions of this Agreement and of the Construction Management Plan, and otherwise in accordance with Good Industry Practice until ten years after Acceptance or earlier termination of this Agreement; provided, however, that all Books and Records which relate to Claims being processed or Disputes brought under the dispute resolution procedures of this Agreement shall be retained and made available until such Disputes and Claims have been finally resolved.

22.1.3 City may:

- (a) review and audit CMAR Firm, its Subcontractors and their respective Books and Records, and interview any employees of CMAR Firm and its Subcontractors who may reasonably have information related to such records as and when City deems necessary from time to time:
  - (i) for the purposes of verifying compliance with this Agreement, the Governmental Approvals and Applicable Laws; and
  - (ii) in connection with the issuance of Change Orders and Agreement amendments or the resolution of Disputes and Claims.
- (b) audit CMAR Firm's Construction Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Construction Management Plan and its component parts, plans and other documentation.

22.1.4 CMAR Firm shall provide, or cause to be provided to City, such information or certifications as determined necessary or desirable by City in connection with any financing, including any WIFIA loan, SRF loan, or bonds issued by City, any

information for inclusion in City's securities disclosure documents, any information in order to comply with Securities and Exchange Commission Rule 15c2-12 regarding certain periodic information and notice of material events. CMAR Firm shall provide customary representations and warranties to City and the capital markets as to the correctness, completeness and accuracy of any information furnished.

- 22.1.5 CMAR Firm shall grant to City and its representatives and legal counsel, and to any Governmental Entities that have audit rights pursuant to any funding agreement or any Applicable Law, the audit and inspection rights under Section 22.1.3 without charge, and agrees to allow such Persons such access to such Books and Records and the Work. Such Persons may conduct any such audit of Books and Records or inspection of the Work upon 48 hours' prior notice, or unannounced and without prior notice where there is good faith suspicion of fraud or other criminal activity. The right of audit and inspection includes the right to make copies and extracts and take notes.
- 22.1.6 Where the payment method for any Work is on a time and materials basis, such examination and audit rights shall include all Books and Records and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates CMAR Firm has been over credited under a previous progress report or payment such over-credit will, at City's sole option, be credited against current progress reports or payments or reimbursed to City by CMAR Firm upon demand therefor.
- 22.1.7 For cost and pricing data submitted in connection with pricing Change Orders or Modifications, unless such pricing is based on adequate price competition (as determined by City), established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by Applicable Laws, such Persons and their representatives have the right to examine all Books and Records related to the negotiation of or performance of Work under such Change Orders and Agreement amendments for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.
- 22.1.8 All Claims or Disputes filed against City shall be subject to audit at any time following the filing of the Claim or Dispute. The audit may be performed by employees, representatives or agents of City or by an auditor under contract with City. No notice is required to commence any audit within 45 days after the Acceptance Date. Thereafter, City shall provide 15 days' notice to CMAR Firm, any Subcontractors or their respective agents before commencing an audit of any Claim or Dispute. CMAR Firm, Subcontractors or their agents shall provide adequate facilities, acceptable to City, for the audit during normal business hours. CMAR Firm, Subcontractors or their agents shall cooperate with the auditors. Failure of CMAR Firm, Subcontractors or their agents to maintain and retain sufficient Books and Records to allow the auditors to verify all or a portion of the Claim or Dispute or to permit the auditor access to the Books and Records of

CMAR Firm, Subcontractors or their agents shall constitute a waiver of the Claim or Dispute and shall bar any recovery thereunder.

- 22.1.9 Material compliance by CMAR Firm with the provisions of this Section 22.1 is a contractual condition precedent to CMAR Firm's right to seek relief.
- 22.1.10 CMAR Firm represents and warrants the completeness and accuracy of all information (including Books and Records) it or its agents provide in connection with the audits identified in this Agreement, and shall cause all Subcontractors to warrant the completeness and accuracy of all information (including Books and Records such Subcontractors or their agents provide in connection with this Section 22.1).
- 22.1.11 CMAR Firm's internal and third party quality and compliance auditing responsibilities shall be set forth in the Construction Management Plan.
- 22.1.12 CMAR Firm shall collect and preserve each of the following types of data in written form contemporaneously during CMAR Firm's performance of the Work, which shall be in form approved by City:
- (a) monthly report of labor by classification of management, supervision, engineering and other technical personnel used on the job;
  - (b) daily labor and equipment reports from CMAR Firm and each Subcontractor for construction related activities;
  - (c) a daily occurrence log (in the form of a bound book with entries in ink) for construction related activities which shall be maintained by CMAR Firm's Representative or his designee(s), in which shall be recorded daily in a narrative form all significant occurrences on the Project, including permit problems, unusual weather, asserted Force Majeure Events, events and conditions causing or threatening to cause delay or disruption or interference with the progress of any of the Work, known injuries to person or property, a listing of each activity depicted on the Construction Phase Project Schedule which is being actively prosecuted, notifications given and received, and significant Project-related meetings; and
  - (d) a daily record in a format reasonably acceptable to City, recording all labor, materials and equipment expenses which are being incurred by reason of any event, condition or circumstance which CMAR Firm believes is or may become the subject of a Claim against City. Any initialed or signed concurrence by the City Representative (or designees) will be for purposes of verifying physical labor, material and equipment count rather than validating CMAR Firm's Claims.
- 22.1.13 To the extent requested by City, CMAR Firm shall provide City with access to and a copy of each item described in this Section 22; provided, however, that the provision of such information shall not constitute notice to City.
- 22.1.14 Under Government Code section 8546.7, this Agreement, and CMAR Firm and City as the contracting parties, are subject to the examination and audit of the

California State Auditor, at the request of City or as part of any audit of City, for a period of three years after the final payment under this Agreement. In addition City shall have the right to examine and audit all Books and Records and other data related to negotiating, pricing, or performing the modification in order to evaluate the accuracy and completeness of the cost or pricing data at no additional cost to City, for a period of four years after final payment under this Agreement.

## 22.2 Public Records Act

- 22.2.1 CMAR Firm acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials prepared, owned, used or retained by City, including materials submitted by CMAR Firm, are subject to the provisions of the California Public Records Act (Government Code section 6250 et seq.) (“**Public Records Act**”).
- 22.2.2 If CMAR Firm believes information or materials submitted to City constitute trade secrets, proprietary information or other information that is not subject to or is excepted from disclosure under the Public Records Act, CMAR Firm shall be solely responsible for specifically and conspicuously designating that information by placing “CONFIDENTIAL” in the center header of each such page affected, as it determines to be appropriate. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim. Nothing contained in this Section 22.2 shall modify or amend requirements and obligations imposed on City by the Public Records Act or other Applicable Laws, and the provisions of the Public Records Act or other Applicable Laws shall control in the event of a conflict between the procedures described above and the Applicable Laws. CMAR Firm is advised to contact legal counsel concerning such Applicable Laws and their application to CMAR Firm.
- 22.2.3 If City receives a request for public disclosure of materials marked “CONFIDENTIAL,” City will use reasonable efforts to provide notice to CMAR Firm of the request and give CMAR Firm an opportunity to identify, by notice, a claimed exception under the Public Records Act or other Applicable Laws within the time period specified in the notice issued by City and allowed under the Public Records Act. Under no circumstances, however, will City be responsible or liable to CMAR Firm or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Applicable Laws or court order, or occurs through inadvertence, mistake or negligence on the part of City or its officers, representative, agents, employees, contractors or consultants.
- 22.2.4 In the event of any proceeding or litigation concerning the disclosure of any material submitted by CMAR Firm to City (including a protective order or temporary restraining order to prevent a disclosure), City’s sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect to the material, and CMAR Firm shall be fully responsible for otherwise prosecuting or defending any action concerning the materials; provided, however, that City reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it

deems necessary or desirable. Except in the case of City's voluntary intervention or participation in litigation, CMAR Firm shall pay and reimburse City within 30 days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs City incurs in connection with any litigation, proceeding or request for disclosure.

### **22.3 Ownership of Documents**

Subject to Section 22.4, all data, sketches, charts, calculations, plans, specifications, electronic files, correspondence, reports, analyses, studies and other documents and materials created or collected under the terms of this Agreement shall be considered "works made for hire" under the US Copyright Act for which City owns the copyright. Working Drawings and Shop Drawings shall become City's property upon delivery to City; and other documents prepared or obtained by CMAR Firm in connection with the performance of its obligations under this Agreement, including studies, manuals, as-built documents, technical and other reports and the like, shall become the property of City upon CMAR Firm's preparation or receipt thereof. Copies of all such documents shall be provided to City upon preparation or receipt thereof by CMAR Firm. CMAR Firm shall maintain all other documents described in this paragraph in accordance with all requirements under Section 22 and shall deliver copies to City as required by this Agreement or upon request if not otherwise required to be delivered, with an indexed set delivered to City as a condition to Acceptance.

### **22.4 Intellectual Property**

CMAR Firm shall secure license(s) in the name of City to use, execute, perform, sublicense, exploit, manufacture, distribute, reproduce, adapt, display, transfer, and prepare derivative works of Intellectual Property, in connection with the Project, including a representation and warranty that the Intellectual Property does not infringe the rights, including Intellectual Property rights, of any other person or entity. To the extent that the foregoing license rights or representation and warranty are refused by any owner of Intellectual Property, CMAR Firm shall secure City's prior written approval, in its sole discretion, for any license, the terms of which are acceptable to such Intellectual Property owner. For the avoidance of doubt, in no event shall CMAR Firm incorporate Intellectual Property into the Project or Work without first securing such licenses. The foregoing requirement shall not apply, however, to mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a Person where such a license cannot be extended to City using commercially reasonable efforts.

## **23. INSURANCE**

**[Note to Proposers: The City is still considering insurance requirements to the Project, including the possibility of an OCIP. Amendments may be made to this provision by Addendum.]**

### **23.1 CMAR Firm Insurance Obligations**

23.1.1 CMAR Firm shall purchase and continuously maintain in full force and effect the insurance coverages specified in this Section 23 and Exhibit 9 (Insurance Requirements) (together "**Insurance Requirements**").

- 23.1.2 Coverage shall be maintained from and after the Effective Date through the expiration of the Warranty Period, or such longer or shorter time as may be specifically provided in the Insurance Requirements.
- 23.1.3 CMAR Firm shall not commence any Work under this Agreement or any Subcontract and City has no duty to pay or perform under this Agreement until CMAR Firm or the applicable Subcontractor:
- (a) obtains all insurance coverage required under the Insurance Requirements for the applicable Work;
  - (b) has complied with Section 23.12;
  - (c) provides City with the verification of coverage required under Section 23.8; and
  - (d) City approves such insurance.
- 23.1.4 City has no duty to pay or perform under this Agreement until the foregoing evidence of insurance, in compliance with all of the Insurance Requirements, has been provided.
- 23.1.5 CMAR Firm shall procure all insurance required under the Agreement from insurance companies authorized to do business in California, with an A.M. Best and Company rating level of A: VII or better, or as otherwise approved by City.

## **23.2 No Limitation of Liability or Insurance Limits**

- 23.2.1 The Parties acknowledge and agree that:
- (a) the insurance coverages provided and limits required under this Agreement are minimum requirements and are not intended to limit CMAR Firm's indemnification obligations under Section 24, nor do the indemnity obligations limit the rights of the Indemnified Parties to the coverage afforded by their insured status;
  - (b) requirements of specific coverage features or limits contained in the Insurance Requirements are not intended as a limitation on coverage, limits, or other requirements, or a waiver of any coverage normally provided by insurance;
  - (c) specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all-inclusive, or to the exclusion of other coverage, or a waiver of any type; and
  - (d) all insurance coverages and limits provided by CMAR Firm, or by third parties pursuant to CMAR Firm's obligations under this Agreement, and, in each case, available or applicable to this Agreement are intended to apply to the full extent of the insurance policies, and nothing contained in

this Agreement limits, or shall be deemed to limit, the application of such insurance coverage.

### **23.3 No Recourse**

There shall be no recourse against City for payment of premiums, deductibles, or other amounts with respect to the Insurance Requirements, except for any deductibles payable by City as specified in this Agreement.

### **23.4 Changes in Insurance Requirements**

City shall provide notice to CMAR Firm of any changes in the Insurance Requirements not less than 60 days before any change. Any additional cost from such change shall be paid by City and any reduction in cost shall reduce the Preconstruction Phase Services Fee or GMP (as applicable) pursuant to a Change Order.

### **23.5 Premiums, Deductibles and Self-Insured Retentions**

23.5.1 CMAR Firm shall pay all insurance premiums required under the Insurance Requirements.

23.5.2 CMAR Firm acknowledges and agrees that:

- (a) for each claim made against insurance policies provided under this Agreement, with respect to all matters for which CMAR Firm is responsible under this Agreement, CMAR Firm shall be solely responsible for all deductibles, self-insured retentions, and loss amounts in excess of the coverage limits provided;
- (b) any self-insured retentions maintained by CMAR Firm over \$500,000 must be declared to and approved by City; provided, however, that self-insured retentions for professional liability insurance and commercial general liability insurance shall be governed by Exhibit 9 (Insurance Requirements); and
- (c) in the event City determines, in its good faith discretion, that conditions exist that could result in substantial financial peril to CMAR Firm, City may, in its good faith discretion, require CMAR Firm to post collateral to City guaranteeing payment of Losses and related investigations, claims administration and defense expenses or require CMAR Firm to reduce the amount of self-insured retentions under the policies.

### **23.6 Required Endorsements or Policy Provisions**

All insurance policies that CMAR Firm is required to provide under this Agreement shall contain provisions or be endorsed to comply with the following requirements:

23.6.1 each of the Indemnified Parties, either through endorsement or policy provision, shall be an insured under CMAR Firm's commercial general liability, automobile liability, umbrella or excess liability, pollution liability, and builder's risk insurance policies. Insured status for Indemnified Parties under any commercial general

liability policy and any builder's risk insurance policies shall be as specified in Exhibit 9 (Insurance Requirements).

- 23.6.2 for claims covered by the Insurance Requirements, said insurance coverage shall be primary insurance with respect to the insureds, additional insureds, and their respective members, directors, officers, employees, representatives, agents, and consultants. Any insurance or self-insurance beyond that required in this Agreement that is maintained by an Indemnified Party or its directors, officers, employees, representatives, agents, or consultants shall not contribute to any claim or loss associated with the Work.
- 23.6.3 the insurance shall apply separately to each insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- 23.6.4 each insurance policy required under the Insurance Requirements shall be endorsed to state that coverage shall not be canceled or non-renewed except after providing to City at least 30 days' prior notice (or at least 10 days' prior notice in the case of cancellation for non-payment of premium), and such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.
- 23.6.5 each policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of professional liability), and no policy issued on an occurrence basis shall have any sunset clause requiring reporting within a specified period of time, except as specified for pollution liability policies in Exhibit 9 (Insurance Requirements).

## **23.7 Waivers**

- 23.7.1 CMAR Firm waives all rights against the Indemnified Parties for any claims by a third party to the extent covered by insurance obtained under the Insurance Requirements, except such rights as CMAR Firm may have to the proceeds of such insurance.
- 23.7.2 City waives all rights against CMAR Firm and each of its agents and employees, representatives, and their respective members, directors, officers, employees, representatives and agents, and consultants performing services in connection with the Project for any claims by a third party to the extent covered by insurance obtained under the Insurance Requirements, except such rights as City may have to the proceeds of such insurance.
- 23.7.3 Workers' compensation policies must be endorsed to waive the insurer's right of subrogation for the Parties identified above. All other policies, except professional liability, shall waive any right of subrogation by endorsement, or by policy provision that would allow the insured to waive its right of recovery against the Indemnified Parties and their respective members, directors, officers, employees, representatives, agents and consultants "before loss."



## 23.8 Verification of Coverage

### 23.8.1 CMAR Firm shall:

- (a) promptly deliver to City evidence of insurance with respect to each renewal policy, as necessary to demonstrate the maintenance of the required insurance coverages for the terms specified in this Agreement; provided such evidence shall be delivered to City not less than 15 days prior to the expiration date of any policy, or such shorter period as approved in advance by City; and
- (b) deliver to City (to the extent of coverage under which it is an additional insured) a copy of policy endorsements and certificates applicable to the Project, upon the issue of a policy of insurance, and otherwise upon request by City; provided that CMAR Firm, acting reasonably, may redact proprietary information from the copy of the policies delivered to City. Upon request by City, CMAR Firm shall deliver proof of payment of premiums for any insurance required to be effected pursuant to the Insurance Requirements. No review or approval of any insurance certificate or insurance policy by City shall derogate from or diminish City.

### 23.8.2 To the extent Exhibit 9 (Insurance Requirements) permits any insurance coverage to be provided through CMAR Firm's corporate insurance program and CMAR Firm provides coverage in this manner, the following additional requirements shall apply:

- (a) the applicable insurance policy shall be renewed at least annually with evidence of such renewal delivered to City in accordance with Section 23.8.1(a);
- (b) the applicable insurance policy shall be endorsed to specify that CMAR Firm is a named insured.

### 23.8.3 If CMAR Firm is a joint venture, CMAR Firm shall provide evidence of the insurance coverages required by the Insurance Requirements for each member of that joint venture. Such evidence:

- (a) may be submitted to City by each joint venture member's insurance broker(s);
- (b) shall be subject to Sections 23.8.1(a) and 23.8.2; and
- (c) shall be endorsed to indicate that it is being provided specifically for the joint venture and shall name each party to the joint venture.

### 23.8.4 For purposes of Section 23.8.3, City shall be satisfied if such insurance company(ies)', broker(s)', agent(s)' or advisor(s)' signatories to such written evidence explicitly state that it/they have read the Agreement (including the Insurance Requirements) and that the Persons required to obtain insurance under this Agreement have obtained and currently maintain such insurance in the coverages and under the conditions listed in the Agreement.

## **23.9 Review of Coverage**

- 23.9.1 City may, at any time, review the coverage, form, and amount of insurance required under the Insurance Requirements, and may require CMAR Firm to make changes in such insurance reasonably sufficient in coverage, form, and amount to provide adequate protection against the kind and extent of risk that exists at that time.
- 23.9.2 City may change the insurance coverages and limits required under the Insurance Requirements by notice to CMAR Firm, whereupon CMAR Firm shall, within 60 days of such notice date, procure the additional and/or modified insurance coverages. Upon such change, any additional cost from such change shall be paid by City and any reduction in cost shall reduce the Target Cost of the Work and, as applicable, the Preconstruction Phase Services Fee and GMP pursuant to a Change Order.
- 23.9.3 Upon request by City, CMAR Firm shall deliver proof of payment of premiums for any insurance required to be effected pursuant to the Insurance Requirements.
- 23.9.4 No review or approval of any insurance certificate or insurance policy by City shall derogate from or diminish City's rights under this Agreement.

## **23.10 Notice of Prosecution of Claims**

Responsibility for notice and prosecution of Claims shall be in accordance with the following:

- 23.10.1 to the extent permitted by Applicable Laws, City may submit its Claims and proposals of defense and indemnity under applicable insurance policies. Unless otherwise directed by City by notice with respect to City's insurance Claims, CMAR Firm shall report and process all potential claims by City or CMAR Firm against the insurance policies. CMAR Firm agrees to report timely to the insurer(s) under such policies any and all matters that may give rise to an insurance claim by CMAR Firm or City and to promptly and diligently pursue such insurance claims in accordance with the Claims procedures specified in such policies, whether for defense or indemnity or both. CMAR Firm shall enforce all legal rights against the insurer under the applicable insurance policies and Applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments;
- 23.10.2 CMAR Firm shall immediately provide notice to City, and thereafter keep City fully informed, of any incident, claim, or other matter of which CMAR Firm becomes aware that involves or could conceivably involve an Indemnified Party as a defendant. CMAR Firm shall cooperate with City and shall require its liability insurers to agree in writing to work with City to assure compliance with all requirements of the California Government Claims Act, Government Code sections 910, 911, 912, 913, and 945, regarding timely response to claims; and
- 23.10.3 City shall promptly provide notice to CMAR Firm of City's incidents, potential claims against City, and matters of which City is actually aware and that may give rise to an City insurance claim, or to a right of defense and indemnification under

Section 24. Delivery of any such notice will constitute a proposal of City's defense of the claim to CMAR Firm and the insurer under any applicable insurance policies, subject to City's rights to control its own defense to the extent provided in Section 24 or by Applicable Laws. City shall cooperate with CMAR Firm as necessary for CMAR Firm to fulfill its duties under this Agreement, including providing CMAR Firm a copy of all written materials City receives asserting a claim against City that is subject to defense by an insurer under an insurance policy or by CMAR Firm under Section 24.

### **23.11 Failure to Comply**

- 23.11.1 If CMAR Firm fails to provide and maintain insurance as required in this Agreement, then City may purchase such insurance or suspend CMAR Firm's right to proceed with the Work until proper evidence of insurance is provided.
- 23.11.2 Any amounts paid by City under Section 23.11.1 (plus an administrative charge equal to 10% of the cost) shall, at City's sole option, be deducted from amounts payable to CMAR Firm, or reimbursed by CMAR Firm upon demand. Nothing in this Agreement shall preclude City from exercising any rights or remedies under this Agreement or otherwise under Applicable Laws as a result of the failure of CMAR Firm or any Subcontractor to satisfy the obligations of the Insurance Requirements.
- 23.11.3 If on account of CMAR Firm's failure to comply with any of the Insurance Requirements, City is adjudged to be responsible for all or any portion of a judgment, loss, or settlement (through admission or stipulation by CMAR Firm or court decision) that would have been covered by insurance but for non-compliance with the Insurance Requirements, then any loss or damage City sustains by reason thereof shall be borne by CMAR Firm, and CMAR Firm shall immediately pay the same to City, upon receipt of notice and evidence of such loss or damage.
- 23.11.4 CMAR Firm acknowledges and agrees that any actual or alleged failure on the part of City to inform CMAR Firm of non-compliance with any requirement imposes no additional obligations on City nor does it waive any rights under this Agreement.

### **23.12 Subcontractor Insurance**

CMAR Firm shall ensure that all Subcontractors secure and maintain all insurance coverages (including workers compensation insurance) and other financial sureties required by CMAR Firm and comply with any applicable insurance statutes.

### **23.13 Disclaimer**

- 23.13.1 CMAR Firm and each Subcontractor shall ensure that their insurance programs fit their particular needs, and it is their responsibility to arrange for and secure any insurance coverage they deem advisable, whether or not specified in this Agreement, and to fulfill their defense and indemnity obligations as specified under this Agreement.

23.13.2 City makes no representation or warranty that the coverage, limits of liability, or other terms specified for the insurance policies required under the Insurance Requirements are adequate to protect CMAR Firm against its undertakings under this Agreement or its liability to any third party, nor shall the existence of any such terms preclude City from taking any actions as are available to it under this Agreement or otherwise under Applicable Laws.

## **24. LIMITATION OF LIABILITY; INDEMNITY; CONSEQUENTIAL DAMAGES**

### **24.1 Limitation of Liability**

24.1.1 Subject to Section 24.1.2, if Construction Phase Approval is obtained, CMAR Firm's aggregate liability to City with respect to Construction Phase shall not exceed an amount equal to 50% of the GMP.

24.1.2 The limitations on CMAR Firm's liability under this Section 24.1 shall not apply to:

- (a) any Losses incurred in connection with the Preconstruction Phase Services;
- (b) any Losses incurred where CMAR Firm abandons the Project Assets in whole or part;
- (c) any Losses to the extent they are covered by insurance required to be carried under this Agreement or would have been covered by such insurance if coverage is not in force;
- (d) any fines or penalties levied or imposed by any Governmental Entity to the extent arising out of any CMAR Firm Fault;
- (e) CMAR Firm's liability for its indemnity obligations as provided in this Agreement, including Section 24.2;
- (f) any Losses incurred by any Indemnified Party in connection with, relating to or arising out of any breach of this Agreement, gross negligence, fraud, bad faith, recklessness, criminal conduct, intentional misconduct or breach of Applicable Law by any CMAR-Related Entity;
- (g) any liquidated damages assessed under Sections 7.5, 12.5 and/or 17.8; and
- (h) any Losses arising out of any CMAR Firm Hazardous Materials Release.

### **24.2 Indemnifications by CMAR Firm**

24.2.1 To the fullest extent permitted by law, CMAR Firm shall release, defend, indemnify and hold the Indemnified Parties free and harmless from any and all Claims and Losses of any kind, to property or Persons, including wrongful death, in any manner arising out of, pertaining to, or incident to any acts, errors or omissions, or willful misconduct of CMAR Firm, CMAR-Related Entities, or any

of their respective officials, officers, employees, subcontractors, suppliers, consultants or agents, in connection with the Project Assets or this Agreement, including:

- (a) the breach or alleged breach of this Agreement by any CMAR-Related Entity;
- (b) any Claims by Subcontractors for nonpayment;
- (c) the payment of all damages, expert witness fees, accountants' fees and attorneys' fees and other related Losses;
- (d) any CMAR Firm Hazardous Materials Release;
- (e) any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, system of methods, processes, design, information or other items provided or communicated to an Indemnified Party in connection with the Project, the Agreement, or the Work;
- (f) any claim or assertion by the Design Engineer, any Other Contractor or any Utility Owner that a CMAR-Related Entity interfered with or hindered the progress or completion of work being performed by such Person so as to cause disruption, delay or Losses, to the extent arising from or related to CMAR-Related Entity's negligence or failure to comply with its obligations to coordinate and integrate the Work with any Other Contractor, any Utility Owner, or the Design Engineer in accordance with this Agreement;
- (g) any fines, penalties or other Losses resulting from a violation of or noncompliance with Applicable Laws (including Environmental Laws);
- (h) the alleged culpable act, error, omission, negligence, fraud, recklessness, willful misconduct, breach or misconduct of any CMAR-Related Entity in or associated with performance of the Work;
- (i) any fines, penalties or other Losses resulting from any act or omission by a CMAR-Related Entity that prevents any of the Existing City Facilities or Utility Facilities from operating as intended; and
- (j) any fines, penalties, legal disposal costs or other Losses (including in connection with any damage or injury) resulting from any act or omission (including any failure to take measures to prevent a sewer spill) by a CMAR-Related Entity that causes a sewer spill from any of the Existing City Facilities or Utility Facilities.

24.2.2 CMAR Firm's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by CMAR Firm or the Indemnified Parties.

24.2.3 To the extent of its liability, CMAR Firm shall pay and satisfy any judgment, award or decree that may be rendered against any of the Indemnified Parties in any suit,

action or other legal proceeding under this Section 24.2. CMAR Firm shall reimburse the Indemnified Parties for any and all Losses and legal expenses incurred by each of the Indemnified Parties in connection with such suit, action or legal proceeding or in enforcing the indemnity provided in this Section 24.2.

24.2.4 Subject to the releases and disclaimers under this Agreement, CMAR Firm's indemnity under this Section 24.2 shall not extend to any Claim or Loss to the extent that such Claim or Loss was directly caused by:

- (a) without limiting Section 24.2.5(a), the active negligence, gross negligence, reckless or willful misconduct, bad faith or fraud of such Indemnified Party;
- (b) City's material breach of any of its obligations under this Agreement; or
- (c) an Indemnified Party's material violation of any Applicable Laws or Governmental Approvals.

24.2.5 The following restrictions shall apply to the indemnities in this Section 24.2:

- (a) except as permitted by Civil Code sections 2782.1, 2782.2 and 2782.5, such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on CMAR Firm for the active negligence of City, or to relieve City of liability for such active negligence; and
- (b) in Claims by an employee of CMAR Firm, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 24.2 is not limited by a limitation on the amount or type of damages, compensation or benefits payable by or for CMAR Firm or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

24.2.6 CMAR Firm's obligations under this Section 24.2 include responsibility for loss of or damage to the Existing Facilities, provided, however, that its obligation to pay damages for loss of use of such Facilities is subject to Section 12.5. Except with respect to loss or damage to the Existing Facilities, the requirement to provide indemnity for any breach or alleged breach of this Agreement as provided in Section 24.2.1(a) is intended to provide protection to City with respect to third party Claims associated with such breach or alleged breach. It is not intended to provide City with an alternative cause of action for damages incurred by City with respect to such breach or alleged breach.

### **24.3 Responsibility of City for Certain Hazardous Materials**

The Parties acknowledge and agree that:

- (a) City may assert that certain third parties may rightfully bear the ultimate legal responsibility for any and all Hazardous Materials that may currently be present on the Site; and

- (b) certain State and federal statutes provide that individuals and firms may be held liable for damages and claims related to Hazardous Materials under such doctrines as joint and several liability and/or strict liability. It is not the intention of the Parties that CMAR Firm be exposed to any such liability to the extent arising out of (i) proper Hazardous Materials Management activities in connection with pre-existing Site contamination, whether known or unknown, and/or (ii) the activities of any Persons other than CMAR-Related Entities.

#### **24.4 No Effect on Other Rights**

The obligations in Sections 24.1 through 24.2.6 shall not be construed to negate, abridge or reduce other rights or obligations which would otherwise exist in favor of an Indemnified Party under this Agreement.

#### **24.5 CERCLA Agreement**

The indemnities in Section 24.2 are intended to operate as agreements under section 9607(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. section 9607(e), and Health and Safety Code section 25364, to defend, indemnify and hold harmless the Indemnified Parties.

#### **24.6 Notification of Third Party Claim**

City and CMAR Firm shall each provide timely notification to the other Party of the receipt of any third party Claim relating to this Agreement.

#### **24.7 Defense and Indemnification Procedures**

24.7.1 If an Indemnified Party receives notice of a Claim or other item covered under this Section 24 or otherwise has Actual Knowledge of a Claim that it believes is within the scope of the indemnities provided under this Agreement, then, as soon as practicable after receipt of the Claim, City shall by notice:

- (a) inform CMAR Firm of the Claim;
- (b) send to CMAR Firm a copy of all written materials City has received asserting such Claim; and
- (c) notify CMAR Firm that if no insurer accepts defense of the Claim, the Indemnified Party will conduct its own defense at CMAR Firm's cost, unless CMAR Firm accepts the tender of the defense in accordance with Section 24.7.4.

24.7.2 As soon as practicable after CMAR Firm receives notice of a Claim or otherwise has Actual Knowledge of a Claim, it shall tender the Claim by notice to the insurers under all potentially applicable insurance policies. City and other Indemnified Parties also may tender such Claims directly to such insurers.

24.7.3 If the insurer under any applicable insurance policy accepts the tender of defense, City and CMAR Firm shall cooperate in the defense as required by the

insurance policy. If no insurer under potentially applicable insurance policies provides defense, then Section 24.7.4 shall apply.

- 24.7.4 If the defense is tendered to CMAR Firm, then within 30 days after receipt of the tender, CMAR Firm shall notify the Indemnified Party whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a notice stating that CMAR Firm:
- (a) accepts the tender of defense and confirms that the Claim is subject to full indemnification under this Agreement without any “reservation of rights” to deny or disclaim full indemnification thereafter;
  - (b) accepts the tender of defense but with a “reservation of rights” in whole or in part; or
  - (c) rejects the tender of defense based on a determination that it is not required to indemnify against the Claim under the terms of this Agreement.
- 24.7.5 If CMAR Firm accepts the tender of defense under Section 24.7.4(a), CMAR Firm may select legal counsel for the Indemnified Party, subject to reasonable approval by the Indemnified Party, and CMAR Firm shall otherwise control the defense of the Claim, including settlement, and bear the fees and costs of defending and settling such Claim; except that City has the right of prior approval of any settlement that waives any defenses or rights of City, increases City’s risk (including risk to the Project or VWP Program) or relates to or may impact the Work or the design, construction, operations, maintenance, financing, or revenues of the Project or the VWP Program. During such defense:
- (a) CMAR Firm shall fully and regularly inform the Indemnified Party in writing of the material developments in the case and settlement discussions; and
  - (b) the Indemnified Party shall fully cooperate in said defense, provide to CMAR Firm all materials and access to personnel that CMAR Firm reasonably requests as necessary for defense, preparation and trial, and which or who are under the control of or reasonably available to the Indemnified Party, and use reasonable efforts to maintain the confidentiality of all communications between it and CMAR Firm concerning such defense.
- 24.7.6 If CMAR Firm responds to the tender of defense as specified in Section 24.7.4(b) or 24.7.4(c), the Indemnified Party may select its own legal counsel and otherwise control the defense of such Claim, including settlement.
- 24.7.7 Notwithstanding CMAR Firm’s acceptance of a tender of defense under Section 24.7.4(a) or 24.7.4(b), the Indemnified Party may assume its own defense by delivering to CMAR Firm notice of such election and the reasons therefore, if the Indemnified Party, at the time it gives notice of the Claim or at any time thereafter, reasonably determines that:



- (a) a conflict exists between the Indemnified Party and CMAR Firm which prevents or potentially prevents CMAR Firm from presenting a full and effective defense; or
- (b) CMAR Firm lacks the financial capacity to satisfy potential liability or to provide an effective defense.

24.7.8 If the Indemnified Party is entitled to and elects to conduct its own defense of a Claim for which it is entitled to indemnification under this Agreement, CMAR Firm shall reimburse on a current basis all reasonable costs and expenses the Indemnified Party incurs in investigating and defending. If the Indemnified Party is entitled to and elects to conduct its own defense, then:

- (a) in the case of a defense that otherwise would be conducted under Section 24.7.4(a) or Section 24.7.4(b), the Indemnified Party may settle or compromise the Claim with CMAR Firm's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to CMAR Firm and opportunity to be heard and without prejudice to the Indemnified Party's rights to be indemnified by CMAR Firm; and
- (b) in the case of a defense conducted under Section 24.7.4(c), the Indemnified Party shall have the right to settle or compromise the Claim without CMAR Firm's prior written consent and without prejudice to its rights to be indemnified by CMAR Firm.

24.7.9 A refusal of, or failure to accept, a tender of defense, as well as any Dispute over whether an Indemnified Party that has assumed control of defense is entitled to do so under Section 24.7.6 shall be resolved in accordance with Section 28 (if the Indemnified Party is bound by Section 28), but the foregoing shall not preclude an Indemnified Party from preserving its rights or defending the Claim pending such resolution.

24.7.10 The Parties acknowledge that this Section 24.7 does not supersede any Applicable Laws governing the required allocation or sharing of liability between the Parties.

## **24.8 Consequential Damages**

24.8.1 Except as otherwise specified in this Agreement, to the extent permitted by Applicable Laws, neither Party shall be liable to the other for punitive, indirect, or Consequential Damages, whether arising out of breach of this Agreement, tort (including negligence) or any other theory of liability, and each Party releases the other Party from any such liability.

24.8.2 The limitations on CMAR Firm's liability under this Section 24.8 shall not apply to or limit any right of recovery City may have with respect to the following (and CMAR Firm agrees it shall not assert the application of this Section 24.8 against any such Losses):

- (a) any amounts paid or payable by or on behalf of CMAR Firm which are covered by insurance proceeds required to be carried under this Agreement, or for which CMAR Firm was required to provide under this Agreement if coverage is not in force;
- (b) Losses in connection with any breach of this Agreement, gross negligence, fraud, bad faith, recklessness, criminal conduct, intentional misconduct, or breach of Applicable Law by any CMAR-Related Entity;
- (c) CMAR Firm's liability for its indemnity obligations as provided under this Agreement, subject to Section 24.2.6;
- (d) CMAR Firm's obligation to pay liquidated damages under Sections 7.5, 12.5 and 17.8; and
- (e) any Losses arising out of any CMAR Firm Hazardous Materials Release.

## **25. CMAR FIRM DEFAULT; TERMINATION**

### **25.1 Preservation of Rights**

To the fullest extent permitted by law, nothing City does or fails to do pursuant to this Section 25 will prejudice any right or remedy of City under this Agreement or Applicable Laws, including the recovery of damages, where CMAR Firm breaches this Agreement.

### **25.2 CMAR Firm Default**

CMAR Firm shall be in default under this Agreement upon the occurrence of any one or more of the following events or conditions (each, a “**CMAR Firm Default**”):

- (a) CMAR Firm fails to: (i) promptly begin the Work following issuance of any NTP; or (ii) resume performance of Work that has been suspended or stopped within a reasonable time after receipt of notice from City to do so or (if applicable) after cessation of the event preventing performance;
- (b) CMAR Firm fails to achieve Completion of the Work or any Early Work in accordance with this Agreement by 180 days after the Completion Deadline for the Work or Early Work;
- (c) CMAR Firm suspends, ceases, stops or abandons the Work, or fails to continuously and diligently prosecute the Work, excluding Work stoppages due to: (i) termination by City; (ii) the occurrence and continuance of a Force Majeure Event or suspension by City; or (iii) City's failure to make undisputed payments to CMAR Firm, in accordance with Section 25.6;
- (d) CMAR Firm fails to obtain, provide or maintain in full force and effect any insurance, Bonds, guarantees or other performance security as and when required under this Agreement, or fails to comply with any requirement of this Agreement pertaining to the amount, terms, or coverage of the same;

- (e) CMAR Firm makes or attempts to make, or suffers a voluntary or involuntary assignment or transfer of this Agreement or any right or interest in this Agreement, except as expressly permitted under this Agreement;
- (f) CMAR Firm fails, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and Applicable Laws, or fails to comply with any Applicable Law or reasonably comply with the instructions of City consistent with this Agreement;
- (g) CMAR Firm fails to make payment when due to City of any amounts owing to City under this Agreement;
- (h) CMAR Firm fails to timely observe or perform, or fails to cause to be timely observed or performed, any other agreement or covenant that CMAR Firm is required to perform under this Agreement;
- (i) any Guarantor revokes or attempts to revoke its obligations under its Guaranty, or otherwise takes the position that such instrument is no longer in full force and effect;
- (j) issuance of any final judgment holding CMAR Firm or any of its equity members liable for an amount in excess of \$100,000 based on a finding of intentional or reckless misconduct or violation of a state or federal false claims act;
- (k) any representation or warranty made by CMAR Firm or any Guarantor in this Agreement (including any questionnaire included in CMAR Firm's Proposal) or any certificate, schedule, instrument or other document delivered by CMAR Firm pursuant to this Agreement was false or materially misleading when made;
- (l) CMAR Firm commences a voluntary case seeking liquidation, reorganization or other relief with respect to CMAR Firm or CMAR Firm's debts under any U.S. or foreign bankruptcy, insolvency or other similar Applicable Law; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of its, or any substantial part of its, assets; becomes insolvent, or generally does not pay its debts as they become due; provides notice of its inability to pay its debts; makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing;
- (m) an involuntary case is commenced against CMAR Firm seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to CMAR Firm or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Applicable Law; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary

case shall not be contested by it in good faith or shall remain undismissed and unstayed for a period of 60 days;

- (n) in any voluntary or involuntary case seeking liquidation, reorganization or other relief with respect to CMAR Firm or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Applicable Law, this Agreement, is rejected, including a rejection under 11 U.S.C. section 365 or any successor statute;
- (o) any voluntary or involuntary case or other act or event described in Sections 25.2(l) through 25.2(n) occurs (and in the case of an involuntary case is not contested in good faith or remains undismissed and unstayed for a period of 60 days) with respect to (i) any member, partner or joint venture member of CMAR Firm (unless said Person has fully met all financial obligations owing to CMAR Firm investment and payments or transfers of money or property previously made to or for the benefit of CMAR Firm are not subject to 11 U.S.C. sections 544, 547, 548 or 550 or any similar applicable state or federal Applicable Law respecting the avoidance or recovery of preferences or fraudulent transfers), (ii) any member, partner or joint venture member of CMAR Firm for whom transfer of ownership or management authority would constitute a prohibited assignment under this Agreement or impermissible Change of Control, or (iii) any Guarantor of CMAR Firm obligations to City under this Agreement, unless another Guarantor of the same obligations then exists, is solvent, is not and has not been the debtor in any such voluntary or involuntary case, has not repudiated its guaranty and is not in breach of its guaranty; or
- (p) after any rights of appeal have been exhausted, CMAR Firm or any Subcontractor (i) is determined disqualified, suspended or debarred, or otherwise excluded from bidding, proposing or contracting with a federal or a State department or agency, or (ii) has not dismissed any Subcontractor whose work is not substantially complete and who is determined disqualified, suspended or debarred, or otherwise excluded from bidding, or proposing or contracting with a federal or a State department or agency.

### 25.3 Notice and Opportunity to Cure

#### 25.3.1 CMAR Firm shall promptly:

- (a) provide notice to City upon the occurrence of a CMAR Firm Default; and
- (b) take steps to commence the cure of and mitigate the effects of any CMAR Firm Default.

#### 25.3.2 If CMAR Firm so notifies City of a CMAR Firm Default in accordance with Section 25.3.1(a) or City considers a CMAR Firm Default has occurred, City may give CMAR Firm a written notice ("**Default Notice**") which contains:

- (a) details of the CMAR Firm Default;

- (b) the cure period (if any) by which CMAR Firm shall cure the CMAR Firm Default in accordance with Sections 25.3.1(b) and 25.3.3; and
- (c) if the CMAR Firm Default is not capable of being cured or no cure period is applicable, a date by which CMAR Firm shall comply with any requirements of City in connection with that CMAR Firm Default.

25.3.3 CMAR Firm shall have the following cure periods under any Default Notice:

- (a) for a CMAR Firm Default described in Sections 25.2(c), 25.2(d), 25.2(f), 25.2(g) and 25.2(h) a period of 15 days after delivery of a Default Notice;
- (b) for a CMAR Firm Default described in Sections 25.2(c), 25.2(d), 25.2(f), 25.2(g), and 25.2(h) that is capable of cure, but by its nature cannot be cured within a period of 15 days after delivery of a Default Notice, as determined by City, such additional period of time shall be allowed as may be reasonably necessary to cure the CMAR Firm Default, so long as CMAR Firm commences such cure within that 15-day period and thereafter diligently prosecutes such cure to completion; except that in no event shall such cure period exceed 60 days in total;
- (c) for the CMAR Firm Defaults described in Sections 25.2(a), a period of seven days after delivery of a Default Notice; and
- (d) for any other CMAR Firm Default, there is no cure period.

**25.4 Right to Terminate Upon Default Termination Event**

- 25.4.1 If any CMAR Firm Default is not subject to cure or is not cured within the applicable cure period (if any) specified in Section 25.3.3 (“**Default Termination Event**”), City may by written notice to CMAR Firm, terminate the Agreement.
- 25.4.2 Termination of this Agreement for a Default Termination Event in accordance with this Section 25.4 will take effect on the date stated in the notice given by City to CMAR Firm under Section 25.4.1.

**25.5 Consequences upon Termination for Default Termination Event**

- 25.5.1 Subject to Section 25.1, if City terminates the Agreement for a Default Termination Event:
  - (a) CMAR Firm shall comply with Section 27; and
  - (b) City:
    - (i) may take over and use, or require CMAR Firm to remove from the Site, the plant, equipment and Work and all materials, equipment and other things intended for the Work, provided City shall be required to equitably reimburse CMAR Firm the actual cost for any such take-over and use up to an amount not to exceed the amount

stated in the Proposal or Construction Phase Amendment (as applicable);

- (ii) may require CMAR Firm to assign to City, or City's nominee, any or all Subcontracts between CMAR Firm and its Subcontractors as required by City;
- (iii) to the extent permitted by Applicable Laws, shall not be obliged to make any further payments to CMAR Firm; and
- (iv) shall be entitled to recover from CMAR Firm all Claims and Losses, in excess of any amount payable to CMAR Firm under this Agreement, suffered or incurred by City arising in connection with such termination.

25.5.2 In the event that this Agreement is terminated for grounds that are later determined not to justify a termination for default, such termination shall be deemed a termination for convenience pursuant to Section 26.

25.5.3 CMAR Firm, each Surety, and each Guarantor shall not be relieved of liability for continuing liquidated damages on account of a CMAR Firm Default or by City's declaration of CMAR Firm Default or by actions taken by City under this Section 25.5.

## **25.6 Right to Stop Work for Failure by City to Make Undisputed Payment**

25.6.1 CMAR Firm may stop Work if City fails to make an undisputed payment due under this Agreement within 60 days after receipt of a written notice of nonpayment from CMAR Firm.

25.6.2 Any Work stoppage under Section 25.6.1 shall be considered a suspension for convenience under Section 12.2.

## **25.7 Conversion to Termination for Convenience**

If City terminates CMAR Firm under this Section 25 and it is later determined that termination was wrongful, the termination shall automatically be converted to and treated as a termination for convenience under Section 26. In such event, CMAR Firm shall be entitled to receive only the amounts payable under Section 26, and CMAR Firm specifically waives any Claim, including for any lost profits or other amounts or damages, to the maximum extent permitted by Applicable Laws.

## **26. TERMINATION FOR CONVENIENCE**

26.1.1 City may, at any time, terminate this Agreement in whole or in part, at its convenience, by notice to CMAR Firm specifying the extent of termination and its effective date.

26.1.2 Termination of this Agreement for convenience in accordance with this Section 26 will take effect on the date stated in the notice given by City to CMAR Firm under Section 26.1.1.

26.1.3 If City terminates the Agreement for convenience, CMAR Firm will be entitled to payment of the following amounts, as determined by City Representative:

- (a) the reasonable cost of removing from the Site all labor, plant, equipment and other things used in performing the Work;
- (b) for Work (including Cost of the Work) carried out in accordance with this Agreement prior to the date of termination, the amount which would have been payable if the Agreement had not been terminated; provided CMAR Firm submits an invoice (in accordance with Section 18.11) for that Work; and
- (c) the cost of goods or materials reasonably ordered by CMAR Firm for the Work, prior to the date of termination, for which CMAR Firm is legally bound to pay, provided that:
  - (i) the value of the goods or materials is not included in the amount payable under Section 26.1.3(b); and
  - (ii) title in the goods and materials will vest in City upon payment.

26.1.4 CMAR Firm shall:

- (a) submit an invoice, in accordance with Section 18.11, for all amounts claimed under Section 26.1.3;
- (b) take all steps possible to mitigate the costs referred to in Section 26.1.3; and
- (c) comply with Section 27.

## 27. TRANSITION UPON TERMINATION / EXPIRATION OF THIS AGREEMENT

Upon termination under Section 25 or Section 26 or in connection with the expiration of this Agreement:

- (a) subject to Section 27(b), CMAR Firm shall comply with all of its obligations under Section 17.9;
- (b) if and as directed by City, CMAR Firm shall discontinue the Work, withdraw from the Site, and remove materials, equipment, tools, and instruments used by, and any debris or waste materials generated by, any CMAR-Related Entity in the performance of the Work and leave the Site in a safe condition;
- (c) CMAR Firm shall remove all temporary utility connections and piping installed and return all affected improvements to their original condition, or better, to the satisfaction of City and to the affected Utility Owner;
- (d) within 10 days after termination or expiration, CMAR Firm shall deliver to City, free and clear of Liens, the following: (i) all special tools, equipment,

furnishings and supplies purchased and/or used by CMAR Firm as provided in this Agreement; and (ii) all replacement spare parts as required by the Special Provisions, Plans and Specifications;

- (e) CMAR Firm shall comply with its obligations under Section 22, including by delivering to City, within 10 days after termination or expiration, possession of any or all Shop Drawings, Working Drawings, Management Plans, and all other completed or partially completed Books and Records that City deems necessary to complete the Work or operate and maintain the Facilities;
- (f) CMAR Firm shall cooperate with City and any third parties required by City Representative, and take all other steps necessary, to ensure that City is able to re-procure or procure the execution of the Work (whether with or without obtaining a proposal from CMAR Firm) or procure the execution of the Work in any other manner which City may determine in its sole discretion;
- (g) CMAR Firm shall confirm the assignment to City of all Subcontracts requested by City, terminate all other Subcontracts, and not enter into any new Subcontracts;
- (h) City may pay any such amounts and/or perform any such acts as may then be required by CMAR Firm under this Agreement or any Subcontracts; and
- (i) City may appropriate any or all materials and equipment on the Site, and City may direct the Surety to complete the Project, enter into an agreement to complete the Project with another contractor or the Surety, or use any other method to complete the Project.

## **28. DISPUTES**

- 28.1** CMAR Firm shall timely comply with all notices and requests for additional compensation and extensions of time as a prerequisite to filing any Claim governed by this Section 28. The failure to timely provide any notice or request required under this Agreement shall constitute a waiver of the right to further pursue the Claim under this Agreement or at law.
- 28.2** Effective January 1, 1991, section 20104 et seq., of the California Public Contract Code prescribes a process utilizing informal conferences, non-binding judicial supervised mediation, and judicial arbitration to resolve disputes on construction claims of \$375,000 or less. Effective January 1, 2017, section 9204 of the Public Contract Code prescribes a process for negotiation and mediation to resolve disputes on construction claims. The intent of this Section 28 is to implement sections 20104 et seq. and section 9204 of the California Public Contract Code; accordingly, this Section 28 shall be construed to be consistent with said statutes.
- 28.3** For purposes of this Section 28, “demand” means a separate demand by CMAR Firm, after City denies CMAR Firm’s duly requested application for (a) a Relief Event, (b) a Change Order, (c) payment of money or damages arising from Work done by or on behalf of CMAR Firm under this Agreement, (d) an amount the payment of which is disputed by



City, or (e) relief of any kind associated with any other Dispute, including disputes between or among CMAR Firm, City, and/or Design Engineer (including disputes relating to any certification, delay, work quality, etc.). All demands governed by this Section 28 may not be filed unless and until CMAR Firm completes all procedures for giving notice and CMAR Firm's request has been denied in whole or in part by City. All demands governed by this Section 28 must be filed no later than the date of the final payment under this Agreement. Any demand must be submitted in writing to City and shall include on its first page the following in 16 point capital font: "THIS IS A DEMAND." Nothing in this Section 28 is intended to or will extend the time limit or supersede notice requirements otherwise provided under this Agreement for the filing of demands, including all requirements pertaining to compensation, payment or other relief for Disputes, Work, Change Orders, and/or Relief Events. Failure to follow such contractual requirements shall bar any Claims and subsequent Claims arising from such demands.

**28.4** CMAR Firm shall submit all demands in the following format:

- (a) The demand shall include (i) a summary of the demand's merit, (ii) a description of the impact on the Project Schedule, Preconstruction Phase Services Fee or GMP (as applicable), (iii) the relief requested, and (iv) the specific provisions of the Agreement and/or other Books and Records pursuant to which the demand is made.
- (b) The demand shall include the documents necessary to substantiate the demand and a list of such documents, including, to the extent relevant to the demand:
  - (i) specifications;
  - (ii) drawings;
  - (iii) clarifications (Requests for Information);
  - (iv) schedules; and
  - (v) any other documents necessary to substantiate the demand.
- (c) The demand shall include:
  - (i) a chronology of events and correspondence related to the demand;
  - (ii) an analysis of the demand's merit;
  - (iii) an analysis of the cost and impact of the events giving rise to the demand on the Preconstruction Phase Services Fee or GMP (as applicable); and
  - (iv) a Time Impact Analysis of the events giving rise to the demand on the then-current Construction Phase Project Schedule in critical path method (CPM) format.

- 28.5** Upon receipt of a demand pursuant to this Section 28, City shall conduct a reasonable review of the demand and, within a period not to exceed 45 days of receipt of the demand or as extended either (a) under Section 28.6 or (b) by mutual agreement of the Parties, shall provide a written statement identifying what portion of the demand is disputed and what portion is undisputed. Any payment due on an undisputed portion of the demand will be processed and made within 30 days after City issues its written response.
- 28.6** If City needs approval from its Council to provide CMAR Firm a written statement as set forth above, and the Council does not meet within last 15 days of the 45-day period or within the mutually agreed-upon extension of time following receipt of a demand, City shall have up to three days following the next publicly noticed meeting of the Council after the 45-day period, or the extension, expires to provide CMAR Firm a written statement identifying the disputed portion and the undisputed portion of the demand.
- 28.7** City may request, in writing, within 20 days of receipt of the demand, any additional documentation supporting the demand or relating to defenses or Claims City may have, and CMAR Firm shall provide that documentation within 10 days after City's request is submitted. After City's receipt of such documentation, if City (in its sole discretion) notifies CMAR Firm that additional information is needed, CMAR Firm shall provide such information within five days after City's notification. City's written statement shall be submitted within 30 days (15 days if the demand is less than \$50,000) after receiving all additional documentation required under this Section 28.7; provided, however, that if City needs approval from the City Council to provide CMAR Firm with a written statement and has requested and received all required additional documentation, City shall have up to three days following the next publicly noticed meeting of the Council held after such 30-day, 15-day, or longer period provided above.
- 28.8** If CMAR Firm disputes City's written statement or if City fails to respond within the time prescribed, CMAR Firm may so notify City within 15 days of the receipt of City's statement or its failure to respond (as applicable) and request an informal conference to meet and confer for settlement of those portions of the demand that remain in dispute. Upon receipt of such request, City shall schedule a meet and confer conference within 30 days for settlement of such dispute.
- 28.9** Within 10 days following the conclusion of the meet and confer conference, if the demand or any portion thereof remains in dispute, City shall provide CMAR Firm with a written statement identifying the portion of the demand that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the demand shall be processed and made within 60 days after City issues its written statement. Any portion of the demand that remains in dispute shall be submitted to nonbinding mediation and City and CMAR Firm shall equally share the associated mediator fees. City and CMAR Firm shall mutually agree to a mediator from JAMS within 10 days after the disputed portion of the demand has been identified in writing. If the Parties cannot select a mediator during that time, then the Parties agree that JAMS shall designate a mediator who is (a) a lawyer experienced in the subject matter of the dispute, a court commissioner or a retired judge, and (b) able to honor the timeframes provided in this Section 28.9.
- (a) For purposes of this Section 28.9, mediation includes any nonbinding process, such as (without limitation) neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation.

Any mediation utilized shall conform to the timeframes in this Section 28.9.

- (b) Unless otherwise agreed to by City and CMAR Firm in writing, the mediation conducted pursuant to this Section 28.9 shall excuse any further obligation under California Public Contract Code section 20104.4 to mediate after litigation has been commenced.
- (c) The mediation shall be held no earlier than the date that CMAR Firm last performs any Work. All unresolved demands shall be considered jointly in a single mediation, unless a new unrelated demand arises after mediation is completed. Notwithstanding the foregoing, City may determine, in its sole discretion, to hold the mediation at an earlier time for those unresolved demands that will affect the Project or the VWP Program.

**28.10** If following the mediation, the demand or any portion remains in dispute, CMAR Firm must file a claim pursuant to Chapter 1 (commencing with section 900) and Chapter 2 (commencing with section 910) of Part 3 of Division 3.6 of Title 1 of the California Government Code prior to initiating litigation. For purposes of those provisions, the running of the period of time within which such claim must be filed shall be tolled from the date CMAR Firm submits the written demand to City until the time the demand is denied, including any period of time utilized by a meet and confer conference under this Section 28.

**28.11** In addition to any and all requirements under this Agreement pertaining to notices of, requests for, and demands to compensation, payment or other relief for Disputes, Work, Change Orders, and/or Relief Events, CMAR Firm must comply with the claim procedures set forth in Government Code section 900 *et seq.* prior to filing any lawsuit against City. Such Government Code claims and any subsequent lawsuit based upon such claims shall be limited to those matters that remain unresolved after all procedures pertaining to Disputes, Work, Change Orders, and/or Relief Events have been followed by CMAR Firm. If no such Government Code claim is submitted or if the prerequisite contractual requirements are not otherwise satisfied as specified herein, CMAR Firm shall be barred from bringing and maintaining a valid lawsuit against City. A Government Code claim must be filed no earlier than the date CMAR Firm last performs Work. A Government Code claim shall be inclusive of all unresolved demands of which CMAR Firm has Actual Knowledge or that CMAR Firm should have reasonably known, excepting only new unrelated demands that arise after the Government Code claim is submitted.

**28.12** The following procedures are established for all civil actions filed to resolve claims of \$375,000 or less:

- (a) Within 60 days, but no earlier than 30 days, following the filing of responsive pleadings, the court shall submit the matter to non-binding mediation unless waived by mutual stipulation of both Parties or unless mediation was held prior to commencement of the action in accordance with Public Contract Code section 9204 and the terms of this Agreement. The mediation process shall provide for the selection within 15 days by both parties of a disinterested third person as mediator, shall be commenced within 30 days of the submittal, and shall be concluded within

15 days from the commencement of the mediation unless a time requirement is extended upon a good cause showing to the court.

- (b) If the matter remains in dispute, the case shall be submitted to judicial arbitration pursuant to Chapter 2.5 (commencing with section 1141.10) of Title 3 of Part 3 of the California Code of Civil Procedure, notwithstanding section 1141.11 of that code. The Civil Discovery Act of 1986 (Article 3 (commencing with section 2016) of Chapter 3 of Title 3 of Part 4 of the California Code of Civil Procedure) shall apply to any proceeding brought under this subdivision consistent with the rules pertaining to judicial arbitration. In addition to Chapter 2.5 (commencing with section 1141.10) of Title 3 of Part 3 of the California Code of Civil Procedure, (i) arbitrators shall, when possible, be experienced in construction law, and (ii) any Party appealing an arbitration award who does not obtain a more favorable judgment shall, in addition to payment of costs and fees under that chapter, also pay the attorneys' fees on appeal of the other Party.

**28.13** City's failure to respond to a Claim from CMAR Firm within the time periods described in this Section 28 or to otherwise meet the time requirements of this Section 28 shall result in such Claim being deemed rejected in its entirety.

**28.14** No Claim or Change Order request from CMAR Firm shall suspend CMAR Firm's obligation to proceed with the performance of the Work, and CMAR Firm shall continue to diligently perform the Work in good faith during the pendency of any such Claim or Change Order request, unless otherwise permitted or required under the express terms of this Agreement or agreed to by the Parties in writing.

## **29. NOTICES**

### **29.1 Notice of Change Order**

If a direction by the City Representative, not specifically identified as a Change Order, constitutes or involves a change to the Work that CMAR Firm believes warrants a Change Order, CMAR Firm shall, if it wishes to make a Claim against City relating to the direction:

- (a) within 7 days of receiving the direction and before commencing work on the subject matter of the direction, give notice to the City Representative that it considers the direction constitutes or involves a Change Order;
- (b) within 21 days after giving the notice under the foregoing subsection (a), submit a written claim to the City Representative which includes the details required by Section 29.3(b); and
- (c) continue to carry out the Work in accordance with this Agreement and all directions of the City Representative, including any direction with respect to which notice has been given under this Section 29.1.

## 29.2 Notices of Other Claims

Except for Claims for:

- (a) City's failure to make an undisputed payment under Section 18.12 of any component of the amounts payable under Section 18;
- (b) a Change Order or Directive Letter instructed by City in accordance with Section 21.2 or to which Section 29.1 applies; or
- (c) a Relief Event (including a Compensable Event), which shall be subject to the Relief Event Notice requirements provided in Section 20,

CMAR Firm shall give the City Representative the notices required by Section 29.3 if it wishes to make a Claim against City with respect to any direction by the City Representative or any other fact, matter or thing (including a breach of this Agreement by City), arising in connection with the Project or this Agreement, including anything with respect to which:

- (x) it is otherwise given an express entitlement under this Agreement, or
- (y) this Agreement expressly provides that:
  - (i) amounts are to be added to any component of the Target Cost of the Work, Preconstruction Phase Services Fee or GMP (as applicable), or
  - (ii) any component of the Target Cost of the Work, Preconstruction Phase Services Fee or GMP (as applicable) will be increased or adjusted as determined by the City Representative, including pursuant to a Change Order.

## 29.3 Prescribed Notices

The notices referred to in Section 29.2 are:

- (a) a written notice within 21 days of the first occurrence of the direction or other fact, matter or thing upon which the Claim is based, expressly specifying that CMAR Firm proposes to make a Claim and identifying the direction or other fact, matter or thing upon which the Claim will be based; and
- (b) a written claim within 21 days of giving the written notice under the foregoing subsection (a), which must include:
  - (i) details concerning the direction or other fact, matter or thing upon which the Claim is based;
  - (ii) the legal basis for the Claim, whether based on a term of this Agreement or otherwise, and if based on a term of this Agreement, clearly identifying the specific term;

- (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
- (iv) details of the amount claimed and how it has been calculated in sufficient detail to permit verification.

#### **29.4 Continuing Events**

If the direction or fact, matter or thing upon which the Claim under Section 29.1(b) or 29.2 is based, or the consequences of the direction or fact, matter or thing are continuing, CMAR Firm shall continue to give the information required by Section 29.3(b) every 28 days after the written claim under Section 29.1(b) or 29.2 (as applicable) was submitted or given to the City Representative, until after the direction or fact, matter or thing upon which the Claim is based has, or the consequences thereof have, ceased.

#### **29.5 Delay in Notices**

If CMAR Firm fails to comply with Sections 29.1 through 29.4:

- (a) City will not be liable (to the fullest extent permitted under Applicable Law) upon any Claim by CMAR Firm, and
- (b) CMAR Firm will be absolutely barred from making any Claim against City,

arising in connection with the relevant direction or fact, matter or thing (as applicable) to which Section 29.1 or 29.2 applies.

#### **29.6 Other Provisions Unaffected**

Nothing in Sections 29.1 through 29.5 will limit the operation or effect of any other provision of this Agreement which requires CMAR Firm to give notice to the City Representative in order to preserve an entitlement to make a Claim against City.

#### **29.7 Notices and Communications**

29.7.1 All notices under this Agreement shall be in writing and provided by one of the following methods: (a) delivered personally; (b) sent by certified mail, with return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (d) sent by email communication followed by a hard copy and with receipt confirmed by telephone.

29.7.2 Notices shall be sent to the following addresses (or to such other address as may from time to time be specified by notice):

- (a) all notices to CMAR Firm shall be delivered to the address specified in the Project Specific Information (Preconstruction Phase) or as otherwise directed by CMAR Firm's Representative; and
- (b) all notices to City shall be marked with the Project's name and shall be delivered to the address specified in the Project Specific Information

(Preconstruction Phase) or as otherwise directed by the City Representative.

29.7.3 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U.S. Postal Service, private carrier or other Person making the delivery, except notices received after 5:00 p.m. (Pacific Time) shall be deemed received on the first day following delivery.

29.7.4 Any technical or other communications pertaining to the Work shall be conducted by the CMAR Firm's Representative and the City Representative.

### **30. MISCELLANEOUS**

#### **30.1 Entire Agreement; Amendments**

This Agreement, together with its incorporated documents and references, contains the entire, integrated agreement of the Parties, and supersedes any and all other prior to contemporaneous negotiations, understandings and oral or written agreements between the Parties. This Agreement may be amended or modified only by a written instrument duly executed by or on behalf of the Parties, except to the extent expressly provided otherwise in this Agreement.

#### **30.2 Waiver**

30.2.1 The failure of a Party to exercise or delay in exercising any right under this Agreement shall not:

- (a) constitute a waiver of such right or any other right under this Agreement; or
- (b) relieve the other Party from performance of its obligations under this Agreement, except as otherwise provided in this Agreement.

30.2.2 No waiver of any right under this Agreement shall be effective unless made in a writing duly executed by a duly authorized representative of the Party charged with the waiver, and any such waiver shall be limited to the specific instance and shall not constitute a waiver of such right in the future or of any other right under this Agreement.

30.2.3 If the Parties make and implement any interpretation of this Agreement without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes.

30.2.4 No waiver of any right under this Agreement shall be deemed to have occurred as the result of any acceptance by City, any payment for or acceptance of the whole or any part of the Work, any extension of time, or any possession taken by City.

### **30.3 Independent Contractor**

CMAR Firm is an independent contractor. Neither CMAR Firm nor any of its employees or agents is or shall be deemed to be an employee or agent of City, and in no event shall the relationship between City and CMAR Firm be construed as creating any relationship whatsoever between City and CMAR Firm's employees or agents. Except as otherwise provided in this Agreement, CMAR Firm has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that CMAR Firm or any Subcontractor hires to perform or assist in performing the Work.

### **30.4 Successors and Assigns**

This Agreement shall be binding upon and inure to the benefit of City and CMAR Firm and each of their permitted successors, assigns and legal representatives.

### **30.5 Survival**

The following provisions shall survive termination or expiration of this Agreement:

- (a) CMAR Firm's and City's representations and warranties;
- (b) the dispute resolution procedures in this Agreement;
- (c) the indemnifications, limitations and releases in this Agreement;
- (d) the limitations on remedies in this Agreement;
- (e) each Party's express obligations following termination; and
- (f) all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work.

### **30.6 Limitation on Third Party Beneficiaries**

30.6.1 Except to the extent that specific provisions (such as, without limitation, the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits:

- (a) no provision of this Agreement is intended to create any third party beneficiary to this Agreement or authorize anyone, other than a Party, to maintain a suit for personal injury or property damage under this Agreement; and
- (b) the duties, obligations and responsibilities of the Parties with respect to third parties shall remain as imposed by law.

30.6.2 This Agreement shall not be construed to create a contractual relationship of any kind between City and any Subcontractor or other Person, except CMAR Firm.



### **30.7 Conflicts of Interest; Campaign Contributions**

During the term of this Agreement:

- 30.7.1 CMAR Firm shall not permit any City officer, official or employee to have a financial interest in this Agreement prohibited by Government Code sections 1090 et seq. and 87100 et seq.
- 30.7.2 CMAR Firm warrants and represents that it has read and understands the requirements of the City's Conflict of Interest Policy and will at all times comply with the requirements of said policy and Applicable Laws regarding conflicts of interest.
- 30.7.3 Neither CMAR Firm nor its employees nor its Subcontractors or Suppliers or their employees shall give or offer to give any campaign contribution to (1) any elected City official, candidate for elected City office, or City committee controlled by an elected City official or candidate or (2) the Mayor, the City Attorney, the Controller, a City Council member, a candidate for any of those elected City offices, or a City committee controlled by a person who holds or seeks any of those elected City offices.

### **30.8 Governing Law; Venue**

This Agreement shall be governed by and construed in accordance with the laws of the State, any applicable federal law, the City Procurement Policy, and the ordinances, regulations, codes, and executive orders enacted and/or promulgated pursuant thereto. The venue for any litigation arising from any Dispute shall be in the County of Ventura.

### **30.9 Severability**

- 30.9.1 If any provision or part of this Agreement is ruled invalid (including invalidity due to any Change in Law in or other change in law) by a court having proper jurisdiction, then the Parties shall:
  - (a) promptly meet and negotiate a substitute for such provision or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including (as applicable) an appropriate adjustment to CMAR Firm's compensation to account for any change in the Work resulting from such invalidated portion; and
  - (b) if necessary or desirable, apply to the court or other decision maker (as applicable) that declared such invalidity for an interpretation of the invalidated portion to guide the Parties' negotiation.
- 30.9.2 The invalidity or unenforceability of any such provision or part shall not affect the validity or enforceability of the balance of this Agreement, which shall be construed and enforced as if this Agreement did not contain such invalid or unenforceable provision or part.

### **30.10 Further Assurances**

Each Party shall promptly execute and deliver to the other Party all such instruments and other documents and assurances as are reasonably requested by the other Party to further evidence the first Party's obligations hereunder, including, specifically with respect to CMAR Firm, assurances regarding the validity of (a) the assignments of any contract required hereunder, and (b) any instruments securing performance hereof.

### **30.11 Counterparts; Electronic Transmittal**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Parties acknowledge that executed copies of this Agreement may be exchanged by facsimile or other electronic transmittal and that the signatures on such copies shall be deemed to be effective as original signatures.

### **30.12 Cumulative Rights; Liability**

Each right and remedy of City under this Agreement is cumulative and in addition to every other right or remedy provided under this Agreement and Applicable Laws, and the exercise by City of any part of such rights or remedies does not preclude the simultaneous or later exercise by City of any or all other such rights or remedies.

### **30.13 Costs**

Each Party is responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation, and execution and delivery of this Agreement. Except as otherwise provided in this Agreement, each Party perform its obligations in accordance with this Agreement at its own cost and risk.

### **30.14 Assignment**

30.14.1 CMAR Firm may collaterally assign its rights to receive payment under this Agreement and may subcontract Work in compliance with the requirements of this Agreement. CMAR Firm shall not otherwise sublet, transfer, assign or dispose of any portion of the Agreement, or delegate any of its duties hereunder, except with City's prior written approval. CMAR Firm's assignment or delegation of any of its Work under this Agreement shall be ineffective to relieve CMAR Firm of its responsibility for the Work assigned or delegated, unless City, in its sole discretion, has approved in writing such relief from responsibility. Any assignment of money shall be subject to all proper set-offs and withholdings in favor of City and to all deductions provided for in this Agreement.

30.14.2 For the purpose of, but without limiting Section 30.14.1, an assignment of this Agreement will be deemed to have occurred where there has been a Change of Control.

### 30.15 Publicity

#### 30.15.1 CMAR Firm:

- (a) shall not furnish any information or issue any document or other written or printed material concerning the Project for publication in the media without the prior written approval of the City Representative; and
- (b) shall refer any enquiries from the media concerning the Project to the City Representative.

#### 30.15.2 Notwithstanding anything to the contrary, CMAR Firm warrants that any publication distributed by CMAR Firm regarding the Project shall include the following statement:

Funding for this project has been provided in full or in part through an agreement with the State Water Resources Control Board. California's Clean Water State Revolving Fund is capitalized through a variety of funding sources, including grants from the United States Environmental Protection Agency and state bond proceeds. The contents of this document do not necessarily reflect the views and policies of the foregoing, nor does mention of trade names or commercial products constitute an endorsement or recommendation of use.

*[Signature Pages Follow]*

**IN WITNESS WHEREOF**, this Agreement has been executed as of [ \_\_ ], 2023.

**CMAR FIRM:**

[\_\_]

By: \_\_\_\_\_

Name:

Title:

Contractor's License No.:

**City:**

**CITY OF BUENAVENTURA, CALIFORNIA**

By: \_\_\_\_\_

Name:

Title:

**APPROVED AS TO FORM:**

By: \_\_\_\_\_

Date: [ \_\_ ], 2023

## ADDENDUM

**[Note to Proposers: This addendum is to be used in the event that CMAR Firm is a Joint Venture]**

Each of the undersigned joint venture members of CMAR Firm agrees that it shall be jointly and severally liable for the obligations of CMAR Firm under this Agreement. Each of the undersigned agree that City and its successors and assignees may enforce any claim or judgment against CMAR Firm arising out of this Agreement directly against CMAR Firm, and each of the undersigned in any order.

Dated as of [\_\_\_\_\_], 2023

[\_\_\_\_\_]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\* \* \*

[\_\_\_\_\_]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*[Modify signature blocks as appropriate, and add signatures for any additional joint venture members]*

## Exhibit 1

### PROJECT SPECIFIC INFORMATION (Preconstruction Phase)

**[Note to Proposers: To be completed post-negotiation of Preconstruction Phase Services and Preconstruction Phase Services Amount]**

GLOSSARY OF TERMS, INTERPRETATION AND MISCELLANEOUS			
<b>City Contact Information:</b> (Section 29.7.2)	Attn: Matthew Cerutti 501 Poli Street Ventura, CA 93001 (805) 658-4771 mcerutti@cityofventura.ca.gov		
<b>CMAR Firm's Contact Information:</b> (Section 29.7.2) <b>[Note to Proposers: To be inserted based on Proposal]</b>	[ ] [ ] [ ] [ ]		
<b>Design Engineer's Contact Information</b>	Kennedy Jenks Attn: Todd Reynolds, Water Practice Leader 275 Battery Street, Suite 550 San Francisco, CA 94111 (415) 243-2453 ToddReynolds@KennedyJenks.com		
<b>Construction Phase Approval Deadline:</b> (Section 9.7)	<b>[Note to Proposers: To be inserted based on Proposal, subject to negotiations with City.]</b>		
<b>Guarantors</b>	<b>[Note to Proposers: To be inserted based on Proposal]</b>		
<b>Warranty Period:</b> (Sections 12.16, 13.2, 13.6)	2 years		
PRECONSTRUCTION PHASE MILESTONES			
<b>Preconstruction Phase Milestones and Preconstruction Phase Milestone Deadlines:</b> (Section 9.5)	<b>Preconstruction Phase Milestone</b>	<b>Additional Description</b>	<b>Preconstruction Phase Milestone Deadline</b>
	[ ]		

<b>[Note to Proposers: To be inserted based on Proposal, subject to negotiations with City]</b>	<input type="checkbox"/>		
	<input type="checkbox"/>		
	<input type="checkbox"/>		
	<b>GMP Proposal</b>		
<b>NATURE OF CONTRACT</b>			
<b>Conditions to NTP 1</b> (Section 9.2.1)	CMAR Firm has delivered to City: 1. Evidence of Preconstruction Phase insurance required under this Agreement; and 2. All Preconstruction Phase Bonds.		
<b>Order of precedence of documents in the case of any ambiguity, discrepancy or inconsistency</b> (Section 1.3)	1. Modifications and Change Orders 2. Agreement, other than Exhibits and Appendices 3. Project Specific Information (Preconstruction Phase) 4. Any other documents forming part of this Agreement (including Exhibits and Appendices), other than the Scope of Work and Proposal Commitments 5. Scope of Work (Preconstruction Phase) 6. Proposal Commitments		
<b>Preconstruction Phase Management Plans</b> (Section 8.3)	1. Construction Management Plan 2. Subcontractor Procurement Plan 3. Risk Management Plan 4. Project Commissioning Plan		
<b>PERSONNEL</b>			
	<b>Representative</b>	<b>Function(s)</b>	

<b>City Representative and its other designated representatives (if any) and their functions:</b> (Section 7.2)	Matthew Cerutti	All functions of City Representative
<b>CMAR Firm Representative</b> <b>[Note to Proposers: To be inserted based on Proposal]</b>	[ ]	
<b>CMAR Firm Key Personnel:</b> (Section 7.4) <b>[Note to Proposers: To be inserted based on Proposal]</b>	<b>Person</b>	<b>Position</b>
	[ ]	Project Executive
	[ ]	Project Manager
	[ ]	Safety Manager
	[ ]	Quality Manager
	[ ]	Preconstruction Manager
	[ ]	Lead Estimator
	[ ]	Procurement Manager
	[ ]	Construction Manager
	[ ]	Construction Superintendent(s)
<b>PERFORMANCE AND PAYMENT BONDS / INSURANCE</b>		
<b>Preconstruction Phase Performance Bond:</b> (Section 6.1, Exhibit 7A)	100% of the Preconstruction Phase Services Fee	
<b>Insurance required for Preconstruction Phase</b>	As provided in <u>Section 23</u> and <u>Exhibit 9B</u>	



<b>SITE</b>	
<b>Site:</b>	Refer to Exhibit 11
<b>Access hours for Work on Site during Preconstruction Phase:</b> (Section 12.11)	A maximum of 8 hours per day Monday through Friday (excluding City-observed holidays), between the hours of 7:00 a.m. and 5:00 p.m., unless otherwise approved by City in writing.
<b>QUALITY</b>	
<b>Period by which Warranty Period will be extended following rectification of a Defect or completion of a Change Order to overcome a Defect:</b> (Sections 12.16, 13.6)	12 months
<b>PAYMENT</b>	
<b>Cost of the Work</b>	[Note to Proposers: To be inserted based on amount negotiated with City following finalization of scope]
<b>Insurance and Bonds</b>	[Note to Proposers: To be inserted based on amount negotiated with City following finalization of scope]
<b>Total Preconstruction Phase Services Amount</b>	[Note to Proposers: To be inserted based on amount negotiated with City following finalization of scope]
<b>CMAR Firm Fee</b>	[Note to Proposers: To be inserted based on amount negotiated with City following finalization of scope]
<b>Construction Phase Major Equipment Mark-up</b>	[Note to Proposers: To be inserted based on amount negotiated with City following finalization of scope]
<b>Construction Phase Subcontractor Mark-up</b>	[Note to Proposers: To be inserted based on amount negotiated with City following finalization of scope]

<b>Times for submission of invoices by CMAR Firm to the City Representative:</b> (Section 18.11)	Monthly, on the 10th day of each month
<b>Payment to Subcontractors:</b> (Section 18.17)	Within 7 days of CMAR Firm's receipt of payment from City.
<b>NOTICES</b> (Section 29)	
<b>Address and email address, for the giving or serving of notices, upon:</b>	<b>City:</b> City
	<b>City Representative:</b> Address:
	<b>CMAR Firm:</b> Address:
	<b>CMAR Firm's Representative:</b> Address:

**APPENDIX 1**

**Preconstruction Phase Services Amount**

(see attached)

**APPENDIX 2**

**Tables of Rates and Prices**

Appendix 2A Preconstruction Phase: Table of Rates and Prices – Personnel Rates

Appendix 2B Preconstruction Phase: Table of Rates and Prices – Other Direct Costs

**Appendix 2A**

**Preconstruction Phase: Table of Rates and Prices – Personnel Rates**

1.1 For the duration of the Preconstruction Phase, the following rates shall apply for all personnel who will perform Preconstruction Phase Services, including Key Personnel, Subcontractors and others. CMAR Firm shall not add any additional personnel classifications to perform Preconstruction Phase Services, except with the prior written approval of City. All personnel shall be assigned an hourly rate in accordance with the equivalent personnel classifications listed in this Appendix 2A (Preconstruction Phase: Table of Rates and Prices – Personnel Rates).

1.2 CMAR Firm represents and warrants that the rates provided in this Appendix 2A (Preconstruction Phase: Table of Rates and Prices – Personnel Rates) reflect all personnel classifications for the Preconstruction Phase Services. Rates shall be fixed as specified and not subject to escalation.

1.3 CMAR Firm represents and warrants that the rates in this Appendix 2A (Preconstruction Phase: Table of Rates and Prices – Personnel Rates) reflect actual rates consistent with Exhibit 7 (Cost of the Work), including Section 1.1.2(a) in that Exhibit.

[Rates on following page]

**Appendix 2B**

**Preconstruction Phase: Table of Rates and Prices – Other Direct Costs**

1.1 For the duration of the Preconstruction Phase, amounts payable to CMAR Firm for its direct costs other than direct labor shall be made based on the rates specified in on the attached Schedule of Other Direct Costs, provided that actual costs shall be payable for allowable costs not specified in this Appendix 2B, subject to verification by City.

1.2 Rates and prices shall be fixed as specified and not subject to escalation.

1.3 CMAR Firm represents and warrants that the rates and prices specified in the attached Schedule of Other Direct Costs are consistent with Exhibit 7 (Cost of the Work).

[Schedule of Other Direct Costs on following page]

### **APPENDIX 3**

#### **Listed Subcontractors (Preconstruction Phase)**

**[Note to Proposers: This list may include Subcontractors that are part of the CMAR Firm's team for Construction Phase Work, as well as Subcontractors for Preconstruction Phase Services.]**

## Exhibit 13

### PROJECT SPECIFIC INFORMATION (Construction Phase)

**[Note to Proposers: To be completed as part of Construction Phase Amendment]**

GLOSSARY OF TERMS, INTERPRETATION AND MISCELLANEOUS			
<b>GMP</b> (Section 9.4)			
<b>Target Cost of the Work (including Cost of the Work Contingency and Allowances)</b>	<b>Category</b>		<b>Amount</b>
	<b>Cost of the Work (excluding Cost of the Work Contingency)</b>		<b>[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City.]</b>
	<b>Cost of the Work Contingency</b>		<b>[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]</b>
	<b>Allowance(s)</b>	<b>Allowance Item</b>	<b>Allowance Value</b>
		<b>[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]</b>	<b>[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]</b>
		<b>[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]</b>	<b>[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]</b>



	Total Cost of the Work (Construction Phase)	
Construction Phase Fixed General Conditions Cost	[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]	
CMAR Firm’s Fee	[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City. Provided such amount shall not exceed the CMAR Firm’s Fee submitted with the Proposal]	
CMAR Firm’s Contingency	[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]	
Premiums for bonds and insurance for Construction Phase	[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]	
TOTAL GMP (Construction Phase)	[Note to CMAR Firm: To be completed based on the sum of the final totals above.]	
Lump Sum SOW, if any:		
Maximum Fee Percentage (Construction Phase)	[ ]% [Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]	
CONSTRUCTION PHASE MILESTONES		
Construction Phase Milestones and Construction Phase Milestone Deadlines: (Section 9.5) [Note to CMAR Firm: City’s targets for Construction Phase Milestone Deadlines are crucial to City’s ability to secure funding for the Project.]	Construction Phase Milestone [Note to CMAR Firm: Additional Construction Phase Milestones may be included based on Construction Phase negotiations]	Construction Phase Milestone Deadline
	NTP 2	[Note to CMAR Firm: To be completed based on Construction Phase negotiations]
	Completion	[Note to CMAR Firm: To be completed based on GMP Proposal as agreed with City]

<b>Lump Sum SOW, if any:</b>			
<b>Early Work (if any)</b> (Section 9.7)			
<b>Early Work</b>			<b>Completion Deadline</b>
[Note to CMAR Firm: If applicable, any Early Work and Completion Deadlines will be determined during the Preconstruction Phase in accordance with Section 9.7.]			[Note to CMAR Firm: TBD, if applicable.]
<b>Target Cost of the Work for the Early Work (including Cost of the Work Contingency)</b>	<b>Category</b>		<b>Amount</b>
	<b>Cost of the Work (excluding Cost of the Work Contingency)</b>		[Note to CMAR Firm: TBD, if applicable.]
	<b>Cost of the Work Contingency</b>		[Note to CMAR Firm: TBD, if applicable.]
	<b>Allowance(s)</b>	<b>Allowance Item</b>	<b>Allowance Value</b>
		[Note to CMAR Firm: TBD, if applicable.]	[Note to CMAR Firm: TBD, if applicable.]
		[Note to CMAR Firm: TBD, if applicable.]	[Note to CMAR Firm: TBD, if applicable.]
<b>Total Cost of the Work for the Early Work</b>		[Note to CMAR Firm: TBD, if applicable.]	
<b>Fixed General Conditions Cost for the Early Work</b>	[Note to CMAR Firm: TBD, if applicable.]		
<b>CMAR Firm's Fee for the Early Work</b>	[Note to CMAR Firm: TBD, if applicable.]		
<b>CMAR Firm's Contingency for the Early Work</b>	[Note to CMAR Firm: TBD, if applicable.]		

<b>Premiums for bonds and insurance for the Early Work</b>	<b>[Note to CMAR Firm: TBD, if applicable.]</b>
<b>TOTAL GMP for the Early Work</b>	<b>[Note to CMAR Firm: To be completed based on the sum of the final totals above.]</b>
<b>Lump Sum SOW, if any:</b>	<b>[Note to CMAR Firm: TBD, if applicable.]</b>
<b>Maximum Fee Percentage for the Early Work</b>	<b>[_]%</b> <b>[Note to CMAR Firm: TBD, if applicable.]</b>

<b>LIQUIDATED DAMAGES [Note to CMAR Firm: To be completed by City as part of Construction Phase Amendment]</b>		
<b>Liquidated Damages for Failure to Achieve Completion of the Work (Section 17.8.1(a))</b>	<b>Days after Completion Deadline</b>	<b>Daily Liquidated Damages Rate for Failure to Achieve Completion of the Work</b>
	1 to 20 days after the Completion Deadline	\$[_] per day
	21 to 60 days after the Completion Deadline	\$[_] per day
	61 days or more after the Completion Deadline up to 365 days	\$[_] per day
	1 to 20 days after the Completion Deadline	\$[_] per day
	21 to 60 days after the Completion Deadline	\$[_] per day
	61 days or more after the Completion Deadline up to 365 days	\$[_] per day
<b>CMAR Firm's Delay Rate (Section 18.6.3(a))</b>		<b>\$[_] per day</b>
<b>NATURE OF CONTRACT</b>		
<b>Conditions to NTP 2</b>		Construction Phase Approval has been achieved.

(Section 9.2.1)	<p>CMAR Firm has delivered to City:</p> <ol style="list-style-type: none"> <li>1. Evidence of Construction Phase insurance required under this Agreement.</li> <li>2. All Construction Phase Bonds.</li> </ol> <p><b>[Note to CMAR Firm: NTP 2 requirements will be developed during the Preconstruction Phase and finalized through the Construction Phase Amendment.]</b></p>
<b>Order of precedence of documents in the case of any ambiguity, discrepancy or inconsistency</b>	<ol style="list-style-type: none"> <li>1. Amendments and Change Orders</li> <li>2. Agreement, other than Exhibits and Appendices</li> <li>3. Project Specific Information (Construction Phase)</li> <li>4. Project Specific Information (Preconstruction Phase)</li> <li>5. Any other documents forming part of this Agreement (including Exhibits and Appendices) other than the Exhibits 1, 13 and 14</li> <li>6. Special Provisions</li> <li>7. Div 01s</li> <li>8. Project Plans</li> <li>9. Standard Plans</li> <li>10. Standard Technical Specifications</li> <li>11. Project Drawings</li> <li>12. Reference Specifications</li> <li>13. Proposal Commitments</li> </ol>
<b>PERFORMANCE AND PAYMENT BONDS / INSURANCE</b>	
<b>Construction Phase Performance Bond:</b> (Section 6.2.1(a), Exhibit 5A)	100% of the GMP
<b>Construction Phase Payment Bond:</b> (Section 6.2.1(b), Exhibit 5B)	100% of the GMP
<b>Insurance required for Construction Phase</b>	As provided in <u>Section 23</u> and <u>Exhibit 9C</u>
<b>PLANNING AND DESIGN</b>	
<b>SITE</b>	
<b>Site</b>	See <u>Exhibit 11</u> .
<b>Access hours for Work during Construction Phase:</b> (Section 12.11)	A maximum of 8 hours per day, Monday through Friday (excluding City-observed holidays), between the hours of 7:00 a.m. and 5:00 p.m., unless otherwise approved by City in writing.

CITY-PROVIDED APPROVALS		
<b>City-Provided Approvals; Anticipated Delivery Dates</b> <b>[Note to CMAR Firm: This list of City-Provided Approvals and anticipated dates is subject to collaborative development during Preconstruction Phase.]</b>	City-Provided Approval	Anticipated Date for City-Provided Approval
	CEQA Approval	[ ]
	NEPA Approval	[ ]
	Coastal Development Permit (Construction)	[ ]
	NPDES Permit	[ ]
	[ ]	[ ]
	[ ]	[ ]
	[ ]	[ ]
	[ ]	[ ]
	[ ]	[ ]

**APPENDIX 1**

**Listed Subcontractors (Construction Phase)**

**APPENDIX 2**

**GMP PROPOSAL**

**[Note to Proposers: to be included based on GMP Proposal agreed at the end of Preconstruction Phase in accordance with the CMAR Agreement.]**

**APPENDIX 3**

**TABLE OF RATES AND PRICES**

Appendix 3A Construction Phase: Table of Rates and Prices – Personnel Rates

Appendix 3B Construction Phase: Table of Rates and Prices – Equipment Rates



### **APPENDIX 3A**

**[Note to Proposers: Personnel Rates to be added to this Appendix by the Construction Phase Amendment.]**

#### **Construction Phase: Table of Rates and Prices – Personnel Rates**

1.1 For the duration of the Construction Phase, the following rates and prices shall apply for all craft labor and other personnel classifications not subject to prevailing wage requirements. All such personnel shall be assigned an hourly rate in accordance with the equivalent personnel classifications listed in this Appendix 3A (Construction Phase: Table of Rates and Prices – Personnel Rates). CMAR Firm shall not add any additional personnel classifications to perform Construction Phase Work, except with the prior written approval of City.

1.2 CMAR Firm represents and warrants that the rates and prices provided in this Appendix 3A (Construction Phase: Table of Rates and Prices – Personnel Rates) (1) reflect all personnel classifications for the Construction Phase Work not subject to prevailing wage requirements, and (2) are consistent with Exhibit 7 (Cost of the Work).

1.3 CMAR Firm represents and warrants that the rates and prices in this Appendix 3A (Construction Phase: Table of Rates and Prices – Personnel Rates) reflect actual rates and prices consistent with Exhibit 7 (Cost of the Work), but without any CMAR Firm markup or fee.

[Rates and prices on following page]

## **APPENDIX 3B**

**[Note to Proposers: Equipment Rates to be added to this Appendix by the Construction Phase Amendment.]**

### **Construction Phase: Table of Rates and Prices – Equipment Rates**

1.1 For the duration of the Construction Phase, the following rates and prices shall apply for all CMAR Firm owned equipment to be used on the Construction Phase Work. CMAR Firm shall not add any additional CMAR Firm owned equipment to perform any Construction Phase Work, except with the prior written approval of City. If any such equipment is added, it shall be assigned an hourly rate consistent with the equivalent equipment listed in this Appendix 3B (Construction Phase: Table of Rates and Prices – Equipment Rates).

1.2 Rates and prices provided in this Appendix 3B (Construction Phase: Table of Rates and Prices – Equipment Rates) shall be fixed as specified and not subject to escalation.

1.3 The rates and prices provided in this Appendix 3C (Construction Phase: Table of Rates and Prices – Equipment Rates) do not include any markup and are otherwise consistent with Exhibit 7 (Cost of the Work).

[Rates and prices on following page]